CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

Decisions, Rulings, Regulations, Notices, and Abstracts

Concerning Customs and Related Matters of the

Bureau of Customs and Border Protection

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

VOL. 38 DECEMBER 15, 2004 NO. 51

This issue contains:

DEPARTMENT OF HOMELAND SECURITY
BUREAU OF CUSTOMS AND BORDER PROTECTION

NOTICE

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Bureau of Customs and Border Protection

General Notices

DEPARTMENT OF HOMELAND SECURITY,
OFFICE OF THE COMMISSIONER OF CUSTOMS.
Washington, DC, December 1, 2004

The following documents of the Bureau of Customs and Border Protection ("CBP"), Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and CBP field offices to merit publication in the CUSTOMS BULLETIN.

MICHAEL T. SCHMITZ,
Assistant Commissioner,
Office of Regulations and Rulings.

19 CFR PART 177

MODIFICATION OF RULING LETTER AND REVOCATION OF TREATMENT RELATING TO CLASSIFICATION OF A FEATHER "DUSTER" TICKLER

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of modification of a ruling letter and revocation of treatment relating to tariff classification of a feather "duster" tickler.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is modifying a ruling letter pertaining to the tariff classification, under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA), of a feather "duster" tickler and to revoke any treatment previously accorded by the Bureau of Customs and Border Protection ("CBP") to substantially identical transactions. Notice of the proposed action was published in the *Customs Bulletin* on September 29, 2004. No comments were received in response to this notice.

EFFECTIVE DATE: This modification and revocation is effective for merchandise entered or withdrawn from warehouse for consumption on or after February 13, 2005.

FOR FURTHER INFORMATION CONTACT: Keith Rudich, General Classification Branch, (202) 572–8782.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "informed compliance" and "shared responsibility." These concepts are premised on the idea that in order to maximize voluntary compliance with CBP laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on CBP to provide the public with improved information concerning the trade community's responsibilities and rights under the CBP and related laws. In addition, both the trade and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended, (19 U.S.C. § 1484) the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, a notice was published on September 29, 2004, in the *Customs Bulletin* Vol. 38, No. 40, proposing to modify NY J89913, dated November 19, 2003. This ruling pertained, in part, to the tariff classification of a feather "duster" tickler. No comments were received in response to this notice.

As stated in the proposed notice, this modification will cover any rulings on this merchandise which may exist but have not been specifically identified. Any party who has received an interpretive ruling or decision (*i.e.*, ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice, should have advised CBP during the comment period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, Customs is revoking any treatment previously accorded by CBP to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third

party, CBP personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or CBP's previous interpretation of the Harmonized Tariff Schedule of the United States Annotated (HTSUSA). Any person involved in substantially identical transactions should have advised CBP during this notice period. An importer's failure to advise CBP of substantially identical transactions or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importer or their agents for importations of merchandise subsequent to the effective date of this final notice.

In NY J89913, dated November 19, 2003, CBP found that a feather "duster" tickler was classified in subheading 9603.90.4000, HTSUSA, as a "feather duster."

CBP has reviewed the matter and determined that the correct classification of the feather "duster" tickler is in subheading 6701.00.3000, HTSUSA, which provides for skins and other parts of birds with their feathers or down, feathers, parts of feathers, down and articles thereof (other than goods of heading 0505 and worked quills and scrapes); articles of feathers or down.

Pursuant to 19 U.S.C. 1625(c)(1), CBP is modifying NY J89913, and any other ruling on this merchandise not specifically identified which is inconsistent with this modification, to reflect the proper classification of the merchandise pursuant to the analysis set forth in Headquarters Ruling Letter (HQ) 967294, attached to this document.

Additionally, pursuant to 19 U.S.C. 1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions.

Dated: November 22, 2004

John Elkins for MYLES B. HARMON,
Director,
Commercial Rulings Division.

Attachment

DEPARTMENT OF HOMELAND SECURITY,
BUREAU OF CUSTOMS AND BORDER PROTECTION,

HQ 967294
November 22, 2004
CLA–2 RR:CR:GC 967294 KBR
CATEGORY: Classification
TARIFF NO.: 6701.00.3000

TED YOUNGS
ORO DESIGN
503 W. Mt. Pleasant Ave.
Philadelphia, PA 19119

RE: Modification of NY J89913; Feather "Duster" Tickler

DEAR MR. YOUNGS:

This is in reference to New York Ruling Letter (NY) J89913, issued to you by the Customs and Border Protection ("CBP"), National Commodity Specialist Division, New York, on November 19, 2003. That ruling concerned the classification of a sensual travel kit under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA). In NY J89913, we determined that the sensual travel kit was not a set and, therefore, the components must be classified individually. One component, a feather "duster" tickler was classified as a "feather duster". We have reviewed NY J89913 and determined that the classification provided for the feather "duster" tickler is incorrect.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), a notice was published on September 29, 2004, in Vol. 38, No. 40 of the *Customs Bulletin*, proposing to modify NY J89913. No comments were received in response to this notice.

FACTS:

NY J89913, concerned an incomplete sensual travel kit which included a feather "duster" tickler. The feather "duster" tickler was classified in subheading 9603.90.4000, HTSUSA, as a feather duster. We have reviewed that ruling and determined that the classification of the feather "duster" tickler is incorrect. This ruling sets forth the correct classification for the feather "duster" tickler.

ISSUES:

What is the correct classification of the feather "duster" tickler?

LAW AND ANALYSIS:

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) in accordance with the General Rules of Interpretation (GRIs). Under GRI 1, merchandise is classifiable according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied.

In interpreting the headings and subheadings, CBP looks to the Harmonized Commodity Description and Coding System Explanatory Notes (EN). Although not legally binding, they provide a commentary on the scope of

each heading of the HTSUSA. It is CBP's practice to follow, whenever possible, the terms of the ENs when interpreting the HTSUSA. *See* T.D. 89–80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

The HTSUSA provisions under consideration are as follows:

6701	Skins and other parts of birds with their feathers or down, feathers, parts of feathers, down and articles thereof (other than goods of heading 0505 and worked quills and scrapes):
6701.00.3000	Articles of feathers or down
9603	Brooms, brushes (including brushes constituting parts of machines, appliances or vehicles), hand-operated mechanical floor sweepers, not motorized, mops and feather dusters; prepared knots and tufts for broom or brush making; paint pads and rollers; squeegees (other than roller squeegees):

* * * * *

9603.90	Other:
9603.90.4000	Feather dusters

At issue is the classification of the feather "duster" tickler in an incomplete sensual travel kit. NY J89913 classified the article as a "feather duster" in subheading 9603.90.4000, HTSUSA. However, EN 96.03 (D) describes "Feather dusters" as consisting "of a bundle of feathers mounted on a handle and are used for dusting furniture, shelves, shop windows, etc." The instant feather article is not used for "dusting". The instant feather article is used to "tickle" the body. Therefore, because the EN includes only articles used for cleaning purposes, we find that subheading 9603.90.4000, HTSUSA, is not appropriate. The feather tickler is more properly classified in subheading 6701.00.3000, HTSUSA, as an article of feathers or down.

HOLDING:

In accordance with the above discussion, the feather "duster" tickler is classified under subheading 6701.00.3000, HTSUSA, as skins and other parts of birds with their feathers or down, feathers, parts of feathers, down and articles thereof (other than goods of heading 0505 and worked quills and scrapes); articles of feathers or down. The 2004 column one, general rate of duty is 4.7% *ad valorum*. Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on the World Wide Web at www.usitc.gov.

EFFECT ON OTHER RULINGS:

NY J89913 dated November 19, 2003, is modified as to the classification under the HTSUSA of the feather "duster" tickler. In accordance with 19 U.S.C. § 1625(c), this ruling will become effective sixty (60) days after publication in the *Customs Bulletin*.

John Elkins for MYLES B. HARMON,
Director,
Commercial Rulings Division.

PROPOSED REVOCATION OF RULING LETTER AND TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF TUNGSTEN CARBIDE RODS

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of proposed revocation of tariff classification ruling letter and revocation of treatment relating to the classification of tungsten carbide rods.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182,107 Stat. 2057), this notice advises interested parties that the Bureau of Customs and Border Protection (CBP) intends to revoke a ruling letter relating to the tariff classification, under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA), of tungsten carbide rods. Similarly, CBP proposes to revoke any treatment previously accorded by it to substantially identical merchandise. Comments are invited on the correctness of the intended actions.

DATE: Comments must be received on or before January 14, 2005.

ADDRESS: Written comments are to be addressed to U.S. Customs and Border Protection, Office of Regulations and Rulings, Attention: Regulations Branch, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229. Submitted comments may be inspected at U.S. Customs and Border Protection, 799 9th Street, N.W., Washington, D.C., during regular business hours. Arrangements to inspect submitted comments should be made in advance by calling Joseph Clark at (202) 572–8768.

FOR FURTHER INFORMATION CONTACT: David Salkeld, General Classification Branch, at (202) 572–8781.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are **informed compliance** and **shared responsibility.** These concepts are premised on the idea that in order to maximize voluntary compliance with customs laws and regulations, the trade community needs to be clearly and completely informed of its legal

obligations. Accordingly, the law imposes a greater obligation on CBP to provide the public with improved information concerning the trade community's responsibilities and rights under the customs and related laws. In addition, both the trade and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, this notice advises interested parties that CBP intends to revoke a ruling letter relating to the tariff classification of tungsten carbide rods. Although in this notice CBP is specifically referring to the revocation of New York Ruling Letter (NY) 897163, dated April 29, 1994 (Attachment A), this notice covers any rulings on this merchandise which may exist but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the one identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (*i.e.*, ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice, should advise CBP during this notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625 (c)(2)), as amended by section 623 of Title VI, CBP intends to revoke any treatment previously accorded by CBP to substantially identical merchandise. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, CBP personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or CBP's previous interpretation of the HTSUS. Any person involved with substantially identical transactions should advise CBP during this notice period. An importer's failure to advise CBP of substantially identical transactions or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of the final decision on this notice.

In NY 897163, CBP classified tungsten carbide rods under subheading 8113.00.0000, HTSUSA, which provides for "Cermets and articles thereof, including waste and scrap."

Based on our analysis of the scope of the terms of headings 8113 and 8209, HTSUS, the Legal Notes, and the Explanatory Notes, we now believe the rods are classified under subheading 8209.00.0030, which provides for, "Plates, sticks, tips and the like for tools, unmounted, of cermets: Of sintered metal carbides."

Pursuant to 19 U.S.C. 1625(c)(1), CBP intends to revoke NY 897163 and any other ruling not specifically identified that is contrary to the determination set forth in this notice to reflect the proper classification of the merchandise pursuant to the analysis set forth in proposed Headquarters Ruling Letter (HQ) 967405 (Attachment B). Additionally, pursuant to 19 U.S.C. 1625(c)(2), CBP intends to revoke any treatment previously accorded by CBP to substantially identical transactions that is contrary to the determination set forth in this notice. Before taking this action, consideration will be given to any written comments timely received.

DATED: November 22, 2004

John Elkins for MYLES B. HARMON,
Director,
Commercial Rulings Division.

[ATTACHMENT A]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,

NY 897163
April 29, 1994
CLA–2–81:S:N:N3:115 897163
CATEGORY: Classification
TARIFF NO.: 8113.00.0000

MR. WILLIAM J. MALONEY
RODE & QUALEY
295 Madison Avenue
New York, NY 10017

RE: The tariff classification of ceramic metal composites from Japan.

DEAR MR. MALONEY:

In your letter dated April 14, 1994, you requested a tariff classification ruling, on behalf of your client, Tulon Inc.

The products consist of sintered ceramic-metal composites (cermets) in the form of rods approximately 1 1/2" in length with round cross-sections of approximately 1/8" diameter. They are further described as follows:

1. Exhibit A - carbide grade HTI10 - comprised of 93% tungsten carbide, 6% cobalt and 1% tantalum carbide
2. Exhibit B - carbide grade MF10 - comprised of 92% tungsten carbide and 8% cobalt
3. Exhibit C - carbide grade UF20 - comprised of 88% tungsten carbide and 12% cobalt Cermets contain both a ceramic constituent (resistant to heat and with a high melting point) and a metallic constituent. Manufacturing processes used in the production of these products, and also their physi-

cal and chemical properties, are related both to their ceramic and metallic constituents, hence their name cermets.

The classification of merchandise under the HTS is governed by the General Rules of Interpretation (GRI'S). GRI 1, HTS, states in part that "for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes . . .". This Rule applies to your product.

The applicable subheading for all of the ceramic metal composites will be 8113.00.0000, Harmonized Tariff Schedule of the United States (HTS), which provides for cermets and articles thereof. The duty rate will be 5.5% ad valorem.

This ruling is being issued under the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

JEAN F. MAQUIRE
Area Director New York Seaport.

[ATTACHMENT B]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,

HQ 967405
CLA–2 RR:CR:GC 967405 DSS
CATEGORY: Classification
TARIFF NO.: 8209.00.0030

MR. WILLIAM J. MALONEY
RODE & QUALEY
295 Madison Avenue
New York, NY 10017

RE: Tungsten carbide rods from Japan; NY 897163 Revoked

DEAR MR. MALONEY:

This letter is pursuant to the Bureau of Customs and Border Protection (CBP) reconsideration of New York Ruling Letter (NY) 897163, dated April 29, 1994, which was issued to you on behalf of Tulon, Inc. by the Director, National Commodity Specialist Division, New York, with respect to the classification under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA), of certain tungsten carbide rods. After review of NY 897163, CBP has determined that the classification of the rods under subheading 8113.00.0000, HTSUSA, was incorrect.

FACTS:

In NY 897163, we classified what were termed "ceramic composite rods" (rods) under heading 8113, HTSUS, as cermets. We described the rods as follows:

> The products consist of sintered ceramic-metal composites (cermets) in the form of rods approximately 1 1/2″ in length with round cross-sections of approximately 1/8″ diameter. They are further described as follows:
>
> 1. Exhibit A - carbide grade HTI10 - comprised of 93% tungsten carbide, 6% cobalt and 1% tantalum carbide
> 2. Exhibit B - carbide grade MF10 - comprised of 92% tungsten carbide and 8% cobalt
> 3. Exhibit C - carbide grade UF20 - comprised of 88% tungsten carbide and 12% cobalt
>
> Cermets contain both a ceramic constituent (resistant to heat and with a high melting point) and a metallic constituent. Manufacturing processes used in the production of these products, and also their physical and chemical properties, are related both to their ceramic and metallic constituents, hence their name cermets. . . .

Based upon this language it is apparent that the instant rods are tungsten carbide rods. Based upon their description, these rods fall under heading 8209, HTSUSA, as plates, sticks, tips and the like for tools, unmounted, of cermets.

ISSUE:

Whether the instant tungsten carbide rods are classified under heading 8209.

LAW AND ANALYSIS:

Classification under the HTSUSA is made in accordance with the General Rules of Interpretation (GRIs). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied.

The Harmonized Commodity Description and Coding System Explanatory Notes (ENs) constitute the official interpretation of the Harmonized System at the international level. While not legally binding, the ENs provide a commentary on the scope of each heading of the HTSUS and are thus useful in ascertaining the classification of merchandise under the System. CBP believes the ENs should always be consulted. *See* T.D. 89–90, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

The HTSUSA provisions under consideration are as follows:

8113.00.0000	Cermets and articles thereof, including waste and scrap
	* * * *
8209.00.00	Plates, sticks, tips and the like for tools, unmounted, of cermets:
8209.00.0030	Of sintered metal carbides

Section XV, Note 4, HTSUS, defines the term "cermets" as products containing a microscopic heterogeneous combination of a metallic component and a ceramic component. The term includes sintered metal carbides (metal carbides sintered with a metal). As we stated in HQ 951642, dated May 1, 1992:

> The tungsten carbide used in certain cutting tools is made by sintering a mixture of tungsten carbide powder and powdered cobalt. The resulting mixture maximizes the wear resistance and strength necessary to resist the shock involved in cutting tool and rock drilling applications. . . .

Sintered tungsten metal carbide articles such as the instant articles do not fall under heading 8101, HTSUSA, as articles of tungsten. Indeed, there is not a question whether the rods are properly considered cermets under the HTSUSA. The issue is whether they are classified under heading 8113, as articles of cermets, or as plates, sticks, tips, and the like for tools, unmounted, of cerments, under heading 8209.

Relevant ENs state that heading 8113 covers cermets, whether unwrought or in the form of articles not elsewhere specified in the Nomenclature. The referenced EN specifically excludes from heading 8113 plates, sticks, tips and the like, of cermets with a basis of metal carbides agglomerated by sintering (heading 8209). The issue, then, is whether the tungsten carbide rods are goods of heading 8209. EN 82.09 states:

> The products of this heading are usually in the form of plates, sticks, tips, rods, pellets, rings, etc . . . [I]n view of their special properties these plates, tips, etc. are welded, brazed or clamped onto lathe tools, milling tools, drills, dies, or other high-speed cutting tools used for working metal or other hard materials. They fall in [heading 8209] whether sharpened or not, or otherwise prepared, but not if already mounted on tools; in the latter case they fall in the headings for tools, particularly heading 8207 (emphasis added).

We believe that the instant rods fall under heading 8209. Heading 8209 states that articles of that heading will be cermets to be used for the tools of heading 8207 and will be in the shape of plates, sticks, tips or similar forms, including rods. The tungsten carbide rods at issue are clearly described by the heading 8209 ENs. CBP's position on classifying tungsten carbide under subheading 8209.00.00, HTSUS, has been both longstanding and consistent. *See* HQ 084271, dated August 8, 1989, and NY 807394, dated March 2, 1995. Moreover, the available information indicates that the instant rods are designed for tooling applications.

Based on the foregoing analysis, the instant tungsten carbide rods are classified under subheading 8209.00.0030, HTSUSA.

HOLDING:

The instant merchandise is provided for in heading 8209, HTSUSA. It is classified under subheading 8209.00.0030, HTSUSA, as "Plates, sticks, tips and the like for tools, unmounted, of cermets: Of sintered metal carbides." The 2004 column one, general rate of duty is 4.6 percent ad valorem.

Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on the World Wide Web at www.usitc.gov.

EFFECT ON OTHER RULINGS:

NY 897163 is REVOKED.

MYLES B. HARMON,
Director,
Commercial Rulings Division.

PROPOSED REVOCATION OF RULING LETTER AND REVOCATION OF TREATMENT RELATING TO TARIFF CLASSIFICATION OF A RADIO ALARM CLOCK INCORPORATING A CD PLAYER

AGENCY: U.S. Customs and Border Protection (CBP), Department of Homeland Security.

ACTION: Notice of proposed revocation of ruling letter, and revocation of treatment relating to tariff classification of a radio alarm clock incorporating a CD player.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930, (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that CBP intends to revoke a ruling letter pertaining to the tariff classification of a radio alarm clock incorporating a CD player under the Harmonized Tariff Schedule of the United States ("HTSUS"). CBP also intends to revoke any treatment previously accorded by CBP to substantially identical transactions. Comments are invited on the correctness of the proposed action.

DATE: Comments must be received on or before January 14, 2005.

ADDRESS: Written comments are to be addressed to U.S. Customs and Border Protection, Office of Regulations and Rulings, Attention: Regulations Branch, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229. Comments submitted may be inspected at Customs and Border Protection, 799 9th Street, NW., Washington, D.C. during regular business hours. Arrangements to inspect submitted comments should be made in advance by calling Joseph Clark at (202) 572–8768.

FOR FURTHER INFORMATION CONTACT: Neil S. Helfand, General Classification Branch, (202) 572–8791.

SUPPLEMENTARY INFORMATION:

Background

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "informed compliance" and "shared responsibility." These concepts are premised on the idea that in order to maximize voluntary compliance with customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obli-

gations. Accordingly, the law imposes a greater obligation on CBP to provide the public with improved information concerning the trade community's responsibilities and rights under the customs and related laws. In addition, both the trade and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)(1)), this notice advises interested parties that CBP intends to revoke a ruling letter pertaining to the classification of a radio alarm clock incorporating a CD player. Although in this notice CBP is specifically referring to NY J83164, this notice covers any rulings on this merchandise which may exist but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the one identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice should advise CBP during this notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)(2)), CBP intends to revoke any treatment previously accorded by CBP to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, CBP personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or CBP's previous interpretation of the Harmonized Tariff Schedule of the United States. Any person involved in substantially identical transactions should advise CBP during this notice period. An importer's failure to advise CBP of substantially identical transactions or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of the final notice of this proposed action.

In NY J83164, dated April 10, 2003, set forth as Attachment A to this document, CBP classified a radio alarm clock incorporating a CD player under subheading 8527.39.0040, Harmonized Tariff Schedule of the United States Annotated ("HTSUSA"), as: "Reception apparatus for radiotelephony, radiotelegraphy or radiobroadcasting, whether or not combined, in the same housing, with sound recording or reproducing apparatus or a clock: Other radiobroadcast receivers, including apparatus capable of receiving also radiotelephony or radiotelegraphy: Other"

It is now the CBP position that the device is classified under subheading 8527.31.6040, HTSUSA, as "Reception apparatus for radiotelephony, radiotelegraphy or radiobroadcasting, whether or not combined, in the same housing, with sound recording or reproducing apparatus or a clock: Other radiobroadcast receivers, including apparatus capable of receiving also radiotelephony or radiotelegraphy: Combined with sound recording or reproducing apparatus: Other."

Pursuant to 19 U.S.C. 1625(c)(1), CBP intends to revoke NY J83164, and any other ruling not specifically identified in order to reflect the proper classification of the merchandise pursuant to the analysis set forth in proposed HQ 967274, which is set forth as Attachment B to this document. Additionally, pursuant to 19 U.S.C. 1625(c)(2), CBP intends to revoke any treatment previously accorded by CBP to substantially identical transactions. Before taking this action, we will give consideration to any written comments timely received.

DATED: November 30, 2004

John Elkins for MYLES B. HARMON,
Director,
Commercial Rulings Division.

Attachments

[ATTACHMENT A]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,

NY J83164
April 10, 2003
CLA–2–85:RR:NC:1:108 J83164
CATEGORY: Classification
TARIFF NO.: 8527.39.0040

MS. AASHA DESLOGE-KURR
BEST BUY
7601 Penn Ave. S, Bldg. D4
Richfield, MN 55423

RE: The tariff classification of clock radios from China.

DEAR MS. DESLOGE-KURR:

In your letter dated April 3, 2003 you requested a tariff classification ruling.

The two items in question are denoted as the CD Clock Radio, model MCR220BK and the CD AM/FM stereo Clock Radio, model CR4955.

Model MCR220BK is an AM/FM radiobroadcast unit with a clock, a CD player, without recording capability, a dual alarm and a LCD display. The clock radio is not capable of operating without an external source of power.

Model CR4955 is an AM/FM radiobroadcast unit with a clock. a CD player, without recording capability, a sleep timer, an LED display, dual alarm, 20 memory programs, and an optional wake feature of either the radio, a buzzer or the CD player. It employs a 9-volt battery as a backup only for the clock. This clock radio cannot operate without an external source of power.

The applicable subheading for the AM/FM clock radios, models MCR220BK and CR4955 will be 8527.39.0040, Harmonized Tariff Schedule of the United States (HTS), which provides for Reception apparatus for radiotelephony, radiotelegraphy and radiobroadcasting, whether or not combined, in the same housing, with sound recording or reproducing apparatus or a clock: Other radiobroadcast receivers, including apparatus capable of receiving also radiotelephony or radiotelegraphy; Other . . . Other. The rate of duty will be 3 percent ad valorem.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Michael Contino at 646–733–3014.

ROBERT B. SWIERUPSKI,
Director,
National Commodity Specialist Division.

[ATTACHMENT B]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,

HQ 967274
CLA–2 RR:CR:GC 967274 NSH
CATEGORY: Classification
TARIFF NO.: 8527.31.6040

MS. AASHA DESLOGE-KURR
BEST BUY
7601 Penn Avenue S, Bldg. D4
Richfield, MN 55423

RE: NY J83164 revoked; CD alarm clock radios

DEAR MS. DESLOGE-KURR:

This is in response to an internal request for reconsideration of NY J83164, dated April 10, 2003, a ruling issued to you, on the classification of two models of radio alarm clock, each incorporating a compact disc (CD) player, under the Harmonized Tariff Schedule of the United States

(HTSUS). NY J83164 classified the merchandise under subheading 8527.39.00, HTSUS. However, in researching a related issue, Customs and Border Protection (CBP) determined that NY J83164 should be revoked. This ruling letter sets forth the correct classification of the subject merchandise.

FACTS:

NY J83164 described the merchandise as follows:

> The two items in question are denoted as the CD Clock Radio, model MCR220BK and the CD AM/FM stereo Clock Radio, model CR 4955.
>
> Model MCR220BK is an AM/FM radiobroadcast unit with a clock, a CD player, without recording capability, a dual alarm and a LCD display. The clock radio is not capable of operating without an external source of power.
>
> Model CR4955 is an AM/FM radiobroadcast unit with a clock, a CD player, without recording capability, a sleep timer, an LED display, dual alarm, 20 memory programs, and an optional wake feature of either the radio, a buzzer or the CD player. It employs a 9-volt battery as a backup only for the clock. This clock radio cannot operate without an external source of power.

ISSUE:

Whether the terms of subheading 8527.31, HTSUS, provide for a radio incorporating both a clock and CD player, such as the merchandise at issue, or whether such a device must be classified under subheading 8527.39.00, HTSUS.

LAW AND ANALYSIS:

Merchandise is classifiable under the HTSUS in accordance with the General Rules of Interpretation (GRIs). GRI 1 provides that classification shall be determined according to the terms of the headings and any relative section or chapter notes and, provided such headings or notes do not otherwise require, according to the remaining GRIs.

GRI 6 states that the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related subheading notes and, *mutatis mutandis*, to the above rules, on the understanding that only subheadings at the same level are comparable. For the purposes of this rule, the relative section, chapter and subchapter notes also apply, unless the context otherwise requires.

The HTSUS provisions under consideration are as follows:

8527	Reception apparatus for radiotelephony, radiotelegraphy or radiobroadcasting, whether or not combined, in the same housing, with a sound recording or reproducing apparatus or a clock:
	Other radiobroadcast receivers, including apparatus capable of receiving also radiotelephony or radiotelegraphy:
8527.31	Combined with sound recording or reproducing apparatus:
	Other:

8527.31.60	Other

* * * * * *

8527.39.00	Other

Heading 8527, HTSUS, applies to reception apparatus for radiobroadcasting, whether or not combined with sound recording or reproducing apparatus or a clock and, therefore, applies to the instant merchandise, a radio alarm clock incorporating a CD player. Because two competing subheadings within heading 8527, HTSUS, are at issue, GRI 3(a) is applied through GRI 6. GRI 3(a) states that when, by application of rule 2(b) or for any other reason, goods are *prima facie* classifiable under two or more subheadings, the subheading which provides the most specific description shall be preferred to a subheading providing a more general description. In *Orlando Food Corp. v. US*, 140 F.3d 1437, 1441 (Fed. Cir. 1998) (quoting, *United States v. Siemens Am., Inc.*, 653 F.2d 471, 478 (CCPA 1981)), the court addressed GRI 3(a), holding that under the rule of relative specificity, the subheading with requirements more difficult to satisfy will prevail and be applied over a more general subheading because it describes the article with the greatest degree of accuracy and certainty. Additionally, with regard to classification when a "basket" provision is being considered, classification therein is appropriate "only when there is no tariff category that covers the merchandise more specifically." *See Apex Universal, Inc. v. United States*, 22 CIT 465 (1998).

CBP notes that subheading 8527.31, HTSUS, is a more specific provision than subheading 8527.39, HTSUS, providing as it does for merchandise "[c]ombined with sound recording or reproducing apparatus," as opposed to "[o]ther." Within subheading 8527.31, HTSUS, CBP has previously classified a clock radio incorporating a cassette player and telephone, specifically under subheading 8527.31.40, HTSUS. *See* HQ 954412, dated August 18, 1993 and NY DD 885222, dated May 12, 1993. Thus, notwithstanding the telephone incorporated into that merchandise, a radio combined with both a sound reproducing device and a clock was classified within subheading 8527.31, HTSUS. These rulings support the conclusion that, because the word "clock" is specifically mentioned in the text to heading 8527, HTSUS, it is not necessary that the word "clock" be specifically mentioned again within subheading 8527.31, HTSUS, in order to classify an item incorporating a clock therein.

The merchandise at issue is similar to that classified in HQ 954412 and NY DD 885222, with respect to both being a radio combined with a sound reproducing device, in this case a CD player, and a clock. As a result, subheading 8527.31, HTSUS, the more specific provision, shall apply. Within that subheading, both models of CD alarm clock radio are classified under 8527.31.60, HTSUS.

HOLDING:

The AM/FM clock radios incorporating CD players, models MCR220BK and CR4955, are classified under subheading 8527.31.6040, Harmonized Tariff Schedule of the United States Annotated, as "Reception apparatus for radiotelephony, radiotelegraphy or radiobroadcasting, whether or not combined, in the same housing, with sound recording or reproducing apparatus or a clock: Other radiobroadcast receivers, including apparatus capable of

receiving also radiotelephony or radiotelegraphy: Combined with sound recording or reproducing apparatus: Other." The column one, general rate of duty is *Free*.

Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on the World Wide Web at www.usitc.gov.

EFFECT ON OTHER RULINGS:

NY J83164 is REVOKED.

MYLES B. HARMON,
Director,
Commercial Rulings Division.

REVOCATION OF RULING LETTER AND TREATMENT RELATING TO TARIFF CLASSIFICATION OF TATTOO NEEDLES

AGENCY: U. S. Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of revocation of ruling letter and treatment relating to tariff classification of tattoo needles.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) is revoking a ruling relating to the tariff classification of tattoo needles, and revoking any treatment CBP has previously accorded to substantially identical transactions. Notice of the proposed revocation was published on October 13, 2004, in the Customs Bulletin.

EFFECTIVE DATE: This revocation is effective for merchandise entered or withdrawn from warehouse for consumption on or after February 13, 2005.

FOR FURTHER INFORMATION CONTACT: James A. Seal, Commercial Rulings Division (202) 572–8779.

SUPPLEMENTARY INFORMATION:

Background

On December 8, 1993, Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are **informed compliance** and **shared responsibility**. These concepts are based on the

premise that in order to maximize voluntary compliance with customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on CBP to provide the public with improved information concerning the trade community's rights and responsibilities under the Customs and related laws. In addition, both the trade and CBP share responsibility in carrying out import requirements. For example, under section 484, Tariff Act of 1930, as amended (19 U.S.C. 1484), the importer of record is responsible for using reasonable care to enter, classify and declare value on imported merchandise, and to provide other necessary information to enable CBP to properly assess duties, collect accurate statistics and determine whether any other legal requirement is met.

Pursuant to CBP's obligations, a notice was published on October 13, 2004, in the Customs Bulletin, Volume 38, Number 42, proposing to revoke NY J84902, dated June 6, 2003, which classified tattoo needles as parts of machines and mechanical appliances, in subheading 8479.90.9495, Harmonized Tariff Schedule of the United States Annotated (HTSUSA). No comments were received in response to this notice.

As stated in the proposed notice, this revocation will cover any rulings on this merchandise which may exist but have not been specifically identified. Any party who has received an interpretative ruling or decision (i.e., ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice, should have advised CBP during the comment period. Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, CBP is revoking any treatment it previously accorded to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, CBP personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or CBP's previous interpretation of the HTSUS. Any person involved in substantially identical transactions should have advised CBP during this notice period. An importer's reliance on a treatment of substantially identical transactions or on a specific ruling concerning the merchandise covered by this notice which was not identified in this notice may raise the rebuttable presumption of lack of reasonable care on the part of the importer or its agents for importations subsequent to the effective date of this final decision.

Pursuant to 19 U.S.C. 1625(c)(1), CBP is revoking NY J84902 to reflect the proper classification of tattoo needles in subheading 8207.90.6000, HTSUSA, as other interchangeable tools for handtools and parts thereof, in accordance with the analysis in HQ 967262, which is set forth as the Attachment to this document. Additionally,

pursuant to 19 U.S.C. 1625(c)(2), CBP is revoking any treatment it previously accorded to substantially identical transactions.

In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after publication in the Customs Bulletin.

DATED: November 30, 2004

John Elkins for MYLES B. HARMON,
Director,
Commercial Rulings Division.

Attachment

HQ 967262
November 30, 2004
CLA–2 RR:CR:GC 967262 JAS
CATEGORY: Classification
TARIFF NO.: 8207.90.6000

PETER D. ALBERDI
A.J. ARANGO, INC.
P.O. Box 75062
Tampa, FL 33675–5062

RE: Tattoo Needles; NY J84902 Revoked

DEAR MR. ALBERDI:

In NY J84902, which the Director of Customs National Commodity Specialist Division, New York, issued to you on June 6, 2003, on behalf of Creative Sourcing and Development, Ltd., Tampa, FL, certain needles for tattoo machines were found to be classifiable as other parts of machines and mechanical appliances, in subheading 8479.90.94, Harmonized Tariff Schedule of the United States (HTSUS).

Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), notice of the proposed revocation of NY J84902 was published on October 13, 2004, in the Customs Bulletin, Volume 38, Number 42. No comments were received in response to that notice.

FACTS:

Samples of the tattoo needles submitted for our review are identical to the ones in NY J84902, except for length. They have a rubber sleeve on one end and may be either a single-tipped needle or, more typically, a group of several very small needles called sharps soldered to a needle bar. They are dipped in ink and used with hand-held, electrically operated tattoo machines which cause a vibratory action that drives the needle in an up-and-down fashion between 50 to 3,000 times a minute. This causes the needle tips to pierce the top layer of skin and deposit the ink into the second or dermal skin layer.

The HTSUS provisions under consideration are as follows:

8207	Interchangeable tools for handtools, whether or not power-operated, or for machine-tools . . .; base metal parts thereof:
8207.90	Other interchangeable tools, and parts thereof:
	Other:
	Not suitable for cutting metal, and parts thereof:
8207.90.6000	For handtools, and parts thereof
*	* * *
8479	Machines and mechanical appliances, having individual functions, not specified or included elsewhere in [chapter 84], parts thereof:
8479.90	Parts:
8479.90.9495	Other

ISSUE:

Whether needles for electrically operated tattoo machines are interchangeable tools for power-operated handtools.

LAW AND ANALYSIS:

Under General Rule of Interpretation (GRI) 1, Harmonized Tariff Schedule of the United States (HTSUS), goods are to be classified according to the terms of the headings and any relative section or chapter notes, and provided the headings or notes do not require otherwise, according to GRIs 2 through 6.

Initially, heading 8479 is in Section XVI, HTSUS. Section XVI, Note 1(k) excludes articles of chapter 82 and 83. Thus, if the tattoo needles at issue are goods of chapter 82 or 83, they cannot be classifiable in heading 8479. The classification expressed in NY J84902 was based on erroneous information that the tattoo machine which utilized the needles did not have a self-contained electric or non-electric motor. In fact, it is now apparent that the tattoo machines are DC coil and spring point machines. In these devices, the coils become electromagnetic by means of current flowing from a DC power supply, via wires, in two directions, through the coils to the adjustable contact screw, and through the frame to the contact spring. Devices that operate in this fashion are known variously as linear electric motors or electrical reciprocating motors. The tattoo machines therefore qualify under heading 8467, HTSUS, as tools for working in the hand, with self-contained electric motor. See NY K87620, dated August 5, 2004. It necessarily follows that tattoo needles solely or principally used with such machines qualify as interchangeable tools for power-operated handtools, of heading 8207.

HOLDING:

Under the authority of GRI 1, tattoo needles for electro-magnetically powered hand-held tattoo machines are provided for in heading 8207. They are classifiable in subheading 8207.90.6000, Harmonized Tariff Schedule of the United States Annotated (HTSUSA). The current rate of duty under this provision is 4.3 percent ad valorem. Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUSA and

the accompanying duty rates are provided on the World Wide Web at www.usitc.gov.

EFFECT ON OTHER RULINGS:

NY J84902, dated June 3, 2003, is revoked. In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after its publication in the Customs Bulletin.

John Elkins for MYLES B. HARMON,
Director,
Commercial Rulings Division.

MODIFICATION OF RULING LETTER AND REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF DRINK MIX KITS

AGENCY: Bureau of Customs and Border Protection, Department of Homeland Security

ACTION: Notice of modification of a ruling letter and revocation of treatment relating to the classification of drink mix kits imported from China.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625 (c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs and Border Protection (CBP) is modifying a ruling concerning the tariff classification of drink mix kits, under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Notice of the proposed revocation of the ruling was published on October 13, 2004, in Volume 38, Number 42, of the *Customs Bulletin.* No comments were received in response to this notice.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after February 13, 2005.

FOR FURTHER INFORMATION CONTACT: Allyson Mattanah, General Classification Branch, (202) 572–8784.

SUPPLEMENTARY INFORMATION:

Background

On December 8, 1993, Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L.

103–182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "informed compliance" and "shared responsibility." These concepts are premised on the idea that in order to maximize voluntary compliance with CBP laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on CBP to provide the public with improved information concerning the trade community's responsibilities and rights under the customs and related laws. In addition, both the trade and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. § 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, CBP published a notice in the October 13, 2004, *Customs Bulletin*, Volume 38, Number 42, proposing to modify New York Ruling Letter (NY) J89555, dated October 28, 2003, and to revoke any treatment accorded to substantially identical merchandise. No comments were received in response to this notice.

In NY J89555, CBP classified the cylinder-shaped glass article in subheading 7013.99.50, HTSUS, which provides for glassware of a kind used for . . . toilet, office, indoor decoration and similar purposes . . . other glassware: other: other: other: valued over thirty cents but not over three dollars each. We now believe that the glass article packaged in the drink mix kit is classifiable as a drinking glass in subheading 7013.29.20, HTSUS.

As stated in the proposed notice, this modification will cover any rulings on this issue which may exist but have not been specifically identified. Any party, who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the issue subject to this notice, should have advised CBP during the notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by Title VI, Customs is revoking any treatment previously accorded by CBP to substantially identical transactions. This treatment may, among other reasons, have been the result of the importer's reliance on a ruling issued to a third party, CBP personnel applying a ruling of a third party to importations involving the same or similar merchandise, or the importer's or

CBP previous interpretation of the Harmonized Tariff Schedule of the United States. Any person involved in substantially identical transactions should have advised CBP during the notice period. An importer's reliance on a treatment of substantially identical transactions or on a specific ruling concerning the merchandise covered by this notice which was not identified in this notice may raise issues of reasonable care on the part of the importer or its agents for importations subsequent to the effective date of this final decision.

Customs, pursuant to section 625(c)(1), is modifying NY J89555, and any other ruling not specifically identified, to reflect the proper classification of the merchandise pursuant to the analysis set forth in Headquarters Ruling Letter (HQ) 967004, set forth as an attachment to this notice. Additionally, pursuant to section 625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions.

In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after publication in the *Customs Bulletin.*

Dated: November 30, 2004

John Elkins for MYLES B. HARMON,
Director,
Commercial Rulings Division.

Attachment

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,

HQ 967004
November 30, 2004
CLA–2 RR:CR:GC 967004AM
CATEGORY: CLASSIFICATION
TARIFF NO.: 7013.29.20

MR. PETER W. KLESTADT
GRUNFELD, DESIDERIO, LEBOWITZ, SILVERMAN AND KLESTADT LLP
399 Park Avenue, 25th Floor
New York, NY 10022–4877

RE: New York Ruling Letter J89555; drink mix kits from China

DEAR MR. KLESTADT:

This is our decision regarding your letter, dated December 15, 2003, addressed to the Director, National Commodity Specialist Division, on behalf of your client, Shonfeld's USA, Inc., requesting reconsideration of New York Ruling Letter (NY) J89555, dated October 28, 2003, regarding the tariff classification, pursuant to the Harmonized Tariff Schedule of the United States (HTSUS), of drink mix kits imported from China. Your letter was forwarded to this office for reply.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, CBP published a notice in the October 13, 2004, *Customs Bulletin*, Volume 38, Number 42, proposing to modify New York Ruling Letter (NY) J89555, dated October 28, 2003, and to revoke any treatment accorded to substantially identical merchandise. No comments were received in response to this notice.

FACTS:

The merchandise consists of a margarita mix kit and a strawberry daiquiri mix package. Item no. DM–205586A is comprised of a bottle of margarita mix, a test tube of colored salt, and a decorated cylinder-shaped glass article. The Margarita mix consists of high fructose corn syrup, water, citric acid, natural and artificial flavor, sucrose acetate, iso-butyrate, and coloring.

Item no. DM–205586B is made up of a bottle of daiquiri mix, a test tube of colored sugar, and a decorated cylinder-shaped glass article. The daiquiri mix consists of water, sugar, fructose corn sweeteners, natural flavor, citric acid, sodium benzoate, and coloring. Instructions on the labels direct the consumer to combine the mixes with rum, tequila, or cointreau, add ice, shake, strain, and pour into a glass with a salt or sugar coated rim.

Both glass articles in the package measure approximately 6 inches high and 2 1/4 inches in diameter. They are frosted cylindrical articles with blending instructions for a margarita or daiquiri and a picture of one or the other of these drinks in the usual shaped drinking glass used for these beverages. The glass article in the package is valued between $0.30 and $3.

In NY J89555, CBP classified the daiquiri sugar in subheading 1701.91.10, HTSUS, which provides for cane or beet sugar and chemically pure sucrose in solid form . . . other . . . containing added coloring but not containing added flavoring matter. CBP classified the margarita and daquiri mixes in subheading 2106.90.99, HTSUS, which provides for food preparations not elsewhere specified or included . . . other . . . other . . . preparations for the manufacture of beverages . . . containing sugar derived from sugar cane and/or sugar beets. CBP classified the margarita salt in subheading 2501.00.00, HTSUS, which provides for salt (including table salt and denatured salt) and pure sodium chloride, whether or not in aqueous solution or containing added anticaking or free-flowing agents. Lastly, CBP classified the cylinder-shaped glass articles in subheading 7013.99.50, HTSUS, which provides for glassware of a kind used for . . . toilet, office, indoor decoration and similar purposes . . . other glassware: other: other: other: valued over thirty cents but not over three dollars each.

ISSUE:

Whether hollow cylinder shaped glass articles packaged in a margarita and daiquiri kit are classified as drinking glasses in the HTSUS.

LAW AND ANALYSIS:

Merchandise imported into the United States is classified under the HTSUS. Tariff classification is governed by the principles set forth in the General Rules of Interpretation (GRIs) and, in the absence of special language or context which requires otherwise, by the Additional U.S. Rules of Interpretation. The GRIs and the Additional U.S. Rules of Interpretation are part of the HTSUS and are to be considered statutory provisions of law for all purposes.

GRI 1 requires that classification be determined first according to the terms of the headings of the tariff schedule and any relative section or chapter notes and, unless otherwise required, according to the remaining GRIs taken in order. GRI 6 requires that the classification of goods in the subheadings of headings shall be determined according to the terms of those subheadings, any related subheading notes and *mutatis mutandis*, to the GRIs. In understanding the language of the HTSUS, the Explanatory Notes (ENs) of the Harmonized Commodity Description and Coding System may be utilized. The ENs, although not dispositive or legally binding, provide a commentary on the scope of each heading, and are generally indicative of the proper interpretation of the HTSUS. *See* T.D. 89–80, 54 Fed. Reg. 35127 (August 23, 1989).

The HTSUS headings and subheadings under consideration are as follows:

7013	Glassware of a kind used for table, kitchen, toilet, office, indoor decoration or similar purposes (other than that of heading 7010 or 7018):
	Drinking glasses, other than of glass-ceramics:
7013.29	Other:
	Other:
7013.29.20	Valued over $0.30 but not over $3 each
	Other glassware:
7013.99	Other:
	Other:
	Other:
7013.99.50	Valued over $0.30 but not over $3 each

The dispute here arises at the subheading level as between drinking glasses and other glassware. An internet search reveals many tall cylindrical shaped glasses called an iced tea or Tom Collins glass for the drinks most often served in them. While the usual glass for a daiquiri or margarita is shaped quite differently, and is even pictured on the glass itself, the glass enclosed in these drink mix kits is recognizable as a drinking glass. It is referred to on the packaging as a "novelty glass" and it is quite clearly intended to be used as a drinking glass. Applying GRI 6, the product is more specifically described in subheading 7013.29, HTSUS, as a drinking glass.

HOLDING:

The glass article in the margarita and daiquari packages is classified in subheading 7013.29.2000, HTSUSA (annotated) the provision for "[G]lassware of a kind used for table, kitchen, toilet, office, indoor decoration or similar purposes (other than that of heading 7010 or 7018): Drinking glasses, other than of glass-ceramics: Other: Other: Valued over $0.30 but not over $3 each." The duty rate for the drinking glass is 22.5%.

Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on the World Wide Web at www.usitc.gov.

EFFECT ON OTHER RULINGS:

NY J89555 is MODIFIED to reflect the proper classification of the glass articles as stated above. The drink mixes, salt and sugar remain classified as they were in NY J89555.

In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after publication in the *Customs Bulletin.*

John Elkins for MYLES B. HARMON,
Director,
Commercial Rulings Division.

PROPOSED REVOCATION OF RULING LETTER AND TREATMENT RELATING TO CLASSIFICATION OF A RETICULATED FOAM FILTER RING

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of proposed revocation of a ruling letter and treatment relating to tariff classification of a reticulated foam filter ring.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs & Border Protection ("CBP") intends to revoke a ruling letter pertaining to the tariff classification, under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA), of a reticulated foam filter ring and to revoke any treatment previously accorded by CBP to substantially identical transactions. Comments are invited on the correctness of the proposed action.

DATE: Comments must be received on or before January 14, 2005.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs and Border Protection, Office of Regulations and Rulings, Attention: Regulations Branch, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229. Submitted comments may be inspected at U.S. Customs and Border Protection, 799 9th Street, NW, Washington, D.C., during regular business hours. Arrangements to inspect submitted comments should be made in advance by calling Mr. Joseph Clark at (202) 572–8768.

FOR FURTHER INFORMATION CONTACT: Keith Rudich, General Classification Branch, (202) 572–8782.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "informed compliance" and "shared responsibility." These concepts are premised on the idea that in order to maximize voluntary compliance with CBP laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on CBP to provide the public with improved information concerning the trade community's responsibilities and rights under the CBP and related laws. In addition, both the trade and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended, (19 U.S.C. § 1484) the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, this notice advises interested parties that CBP intends to revoke a ruling letter pertaining to the tariff classification of a reticulated foam filter ring. Although in this notice CBP is specifically referring to one ruling, NY K80327, this notice covers any rulings on this merchandise which may exist but have not been specifically identified. CBP has undertaken reasonable efforts to search existing data bases for rulings in addition to the one identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (*i.e.*, ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice, should advise CBP during this notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, CBP intends to revoke any treatment previously accorded by CBP to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, CBP personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or CBP's previous interpretation of the HTSUSA. Any person involved in substantially identical transactions should advise CBP during

this notice period. An importer's failure to advise CBP of substantially identical transactions or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importer or their agents for importations of merchandise subsequent to the effective date of the final notice of this proposed action.

In NY K80327, dated November 21, 2003, set forth as "Attachment A" to this document, CBP found that a reticulated foam filter ring was classified in subheading 8421.39.8015, HTSUSA, as centrifuges, including centrifugal dryers; filtering or purifying machinery and apparatus, for liquids or gases; parts thereof: filtering or purifying machinery and apparatus for gases: other: other: other.

CBP has reviewed the matter and determined that the correct classification of the reticulated foam filter ring is in subheading 8421.31.0000, HTSUSA, which provides for centrifuges, including centrifugal dryers; filtering or purifying machinery and apparatus, for liquids or gases; parts thereof: filtering or purifying machinery and apparatus for gases: intake air filters for internal combustion engines.

Pursuant to 19 U.S.C. 1625(c)(1), CBP intends to revoke NY K80327, and any other ruling not specifically identified, to reflect the proper classification of the merchandise pursuant to the analysis set forth in proposed Headquarters Ruling Letter (HQ) 966942, as set forth in "Attachment B" to this document. Additionally, pursuant to 19 U.S.C. 1625(c)(2), CBP intends to revoke any treatment previously accorded by Customs to substantially identical transactions. Before taking this action, consideration will be given to any written comments timely received.

Dated: November 29, 2004

John Elkins for MYLES B. HARMON,
Director,
Commercial Rulings Division.

Attachments

[ATTACHMENT A]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,

NY K80327
November 21, 2003
CLA–2–84:RR:NC:1:104 K80327
CATEGORY: Classification
TARIFF NO.: 8421.39.8015

MR. KARL KRUEGER
DANZAS AEI
2660 20th Street
Port Huron, MI 48060

RE: The tariff classification of reticulated foam filter rings from Canada

DEAR MR. KRUEGER:

In your letter dated October 17, 2003 on behalf of Purolator Filters, a division of Arvin Meritor of Dexter, Missouri you requested a tariff classification ruling.

A sample of a radial air filter with a reticulated foam filter ring wrapped around the outside has been provided. The ring, also referred to as a foam wrap, is formed by sewing the ends of the foam material together. It has a circumference of approximately 3′9″ with a width of 4″ and a thickness of just under 1/2″. The filter with the ring is placed in an automotive air filter housing. A drawing of the foam filter ring has also been provided.

You suggest that classification should be under HTS subheading 8421.99.0080 which provides for parts of filtering or purifying machinery and apparatus. The foam filter ring by itself however functions as a filter. Also known as a prefilter, it removes larger and coarser particles thus extending the life of the primary filter element which is composed of a pleated cellulose, resin impregnated paper.

The applicable subheading for the reticulated foam filter ring will be 8421.39.8015, Harmonized Tariff Schedule of the United States (HTS), which provides for filtering or purifying machinery and apparatus, for gases: other: other. The rate of duty will be free.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Robert Losche at 646–733–3011.

ROBERT B. SWIERUPSKI,
Director,
National Commodity Specialist Division.

[ATTACHMENT B]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,

HQ 966942
CLA–2 RR:CR:GC 966942 KBR
CATEGORY: Classification
TARIFF NO.: 8421.31.0000

KARL F. KRUEGER
DANZAS AEI INTERCONTINENTAL
29200 Northwestern Highway
Southfield, MI 48034

RE: Revocation of NY K80327; Reticulated Foam Filter Ring

DEAR MR. KRUEGER:

This is in reference to New York Ruling Letter (NY) K80327, issued to you by the Customs and Border Protection ("CBP"), National Commodity Specialist Division, New York, on November 21, 2003, on behalf of Purolator Filters, a division of Arvin Meritor of Dexter, Missouri. That ruling concerned the classification of a reticulated foam filter ring, under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA). We have reviewed NY K80327 and determined that the classification provided for the reticulated foam filter ring is incorrect.

FACTS:

In NY K80327, it was determined that the reticulated foam filter ring was classifiable in subheading 8421.39.8015, HTSUSA, as centrifuges, including centrifugal dryers; filtering or purifying machinery and apparatus, for liquids or gases; parts thereof: filtering or purifying machinery and apparatus for gases: other: other: other. The reticulated foam filter ring is also referred to as a "foam wrap" and a "pre-filter." The article is a piece of open cell polyurethane foam approximately three feet, nine inches long with a width of four inches and a thickness of just under 1/2 inch. The four inch ends of the foam are sewn together to create a ring. The reticulated foam filter ring is intended to fit around the outside of a primary radial air filter element ring which is composed of a pleated cellulose, resin impregnated paper inside a plastic and metal-screen casing. The combined air filter is intended for installation in an automotive engine. The reticulated foam filter ring is intended to act as a pre-filter to remove larger and coarser particles, extending the life of the primary air filter element. The reticulated foam filter rings are sold in conjunction with the primary air filter element as well as sold separately as replacements. A sample of the reticulated foam filter ring with a primary air filter element was submitted for our review.

We have reviewed that ruling and determined that the classification of the reticulated foam filter ring is incorrect. This ruling sets forth the correct classification.

ISSUE:

What is the correct classification under the HTSUSA of a reticulated foam filter ring for use with a primary air filter element in an automotive engine?

LAW AND ANALYSIS:

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) in accordance with the General Rules of Interpretation (GRIs). Under GRI 1, merchandise is classifiable according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied.

In interpreting the headings and subheadings, CBP looks to the Harmonized Commodity Description and Coding System Explanatory Notes (EN). Although not legally binding, they provide a commentary on the scope of each heading of the HTSUSA. It is CBP's practice to follow, whenever possible, the terms of the ENs when interpreting the HTSUSA. *See* T.D. 89–80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

The HTSUSA provisions under consideration are as follows:

8421	Centrifuges, including centrifugal dryers; filtering or purifying machinery and apparatus, for liquids or gases; parts thereof:
*	* * * * *
	Filtering or purifying machinery and apparatus for gases:
8421.31.0000	Intake air filters for internal combustion engines
8421.39	Other:
8421.39.80	Other:
8421.39.8015	Other
*	* * * * *
	Parts:
*	* * * * *
8421.99.00	Other:
8421.99.0080	Other

The article at issue is a reticulated foam filter ring for use with a primary air filter in an automotive engine. The ENs for heading 8421, HTSUSA, in pertinent part, describe articles in this heading:

(II)(B) **Filtering or purifying machinery, etc., for gases.**

These gas filters and purifiers are used to separate solid or liquid particles from gases, either to recover products of value . . ., or to eliminate harmful materials (e.g., dust extraction, removal of tar, etc., from gases or smoke fumes, removal of oil from steam engine vapours).

They include:

(1) **Filters and purifiers acting solely by mechanical or physical means**; these are of two types. In the first type, . . . the separating element consists of a porous surface or mass (felt, cloth, metallic

sponge, glass wool, etc.). In the second type, separation in achieved by suddenly reducing the speed of the particles drawn along with the gas, so that they can then be collected by gravity, trapped on an oiled surface, etc. Filters of these types often incorporate fans or water sprays.

Filters of the first type include:

(i) **Intake air filters for internal combustion engines.** These often combine the two systems described above.

CBP has previously found that an air filter for an automobile engine is classified in subheading 8421.31.0000, HTSUSA. *See* NY B89510 (October 9, 1997). However, the instant article is a "pre-filter" for an automobile air filter. The instant article is reticulated foam which wraps around the primary air filter element. Section XVI Note 2(a), HTSUSA, states:

> Parts which are goods included in any of the headings of chapter 84 or 85 (other than headings 8409, 8431, 8448, 8466, 9473, 8485, 8503, 8522, 8529, 8538 and 8548) are in all cases to be classified in their respective headings;

Section XVI Note 2(b), HTSUSA, states:

> Other parts, if suitable for use solely or principally with a particular kind of machine, or with a number of machines of the same heading (including a machine of heading 8479 or 8543) are to be classified with the machines of that kind or in heading 8409, 8431, 8448, 8466, 8473, 8503, 8522, 8529 or 8538 as appropriate. However, parts which are equally suitable for use principally with the goods of headings 8517 and 8525 to 8528 are to be classified in heading 8517;

The ENs for Section XVI at General, (II) Parts (Section Note 2), states that "parts which in themselves constitute an article covered by a heading of this Section . . .; these are in all cases classified in their own appropriate heading even if specially designed to work as part of a specific machine." The EN language for Section XVI Note 2 was cited by the court in *Nidec Corp. v. United States*, 861 F. Supp. 136 (CIT 1994), *aff'd.* 68 F.3d 1333 (Fed. Cir. 1995). The court, applying the EN for Section XVI Note 2, determined that if a good can be classified in its own heading in accordance with Legal Note 2(a), then classification as a part under Legal Note 2(b) is inappropriate. *See also* HQ 962946 (May 1, 2000), HQ 952026 (July 23, 1992), HQ 963219 (February 5, 2001). Therefore, applying Note 2(a) and the court's reasoning to the instant reticulated foam filter ring, directs classification of the article in its own appropriate subheading, 8421.31.0000, HTSUSA, and not as a part. *See* HQ 962623 (July 22, 1999)(finding that an air filter drum element for an automobile air conditioning/heat filter was not a filter "part" of subheading 8421.99.00, HTSUSA, but should be classified as a filter article itself).

CBP has previously found that pre-filters are classified in heading 8421, HTSUSA, as filters, not as parts of filters. *See* NY 898762 (June 29, 1994) and NY 898508 (June 28, 1994). In particular, CBP found that a pre-filter intended for automotive use was classified in subheading 8421.31.0000, HTSUSA, as an intake air filter for internal combustion engines. *See* NY 899838 (August 4, 1994). Therefore, we agree with the decision you received in NY K80327, that the instant reticulated foam filter ring should not be classified as a "part", but should be classified in its own right.

Air filters have long been made from foam and have been classified in heading 8421, HTSUSA. *See* NY 815060 (September 28, 1995), NY I86500 (October 18, 2002), and NY 810649 (June 8, 1995). The instant reticulated foam filter ring acts as a pre-filter for the primary air filter element. However, although it is considered a "pre-filter", the reticulated foam filter ring is itself a "filter". The reticulated foam filter ring actually removes unwanted particles from the air prior to reaching the primary air filter element and the automotive engine, thus, protecting the engine and extending the life of the primary air filter element. In the instant case, NY K80327 classified the pre-filter in the general "basket" provision of subheading 8421.39.8015, HTSUSA. However, as discussed above, the instant article is itself an air filter. Pursuant to GRI 1, the pre-filter is classified in subheading 8421.31.0000, HTSUSA, as intake filters for internal combustion engines, and not in the "basket" "other" provision of subheading 8421.39.8015, HTSUSA. *See, e.g., Apex Universal, Inc. v. United States*, CIT Slip Op. 98–69 (May 21, 1998) ("Classification of imported merchandise in a basket provision is appropriate only when there is no tariff category that covers the merchandise more specifically. [citations omitted]"); HQ 966659 (December 15, 2003); HQ 962759 (November 10, 1999). Therefore, although called a "pre-filter", the instant reticulated foam filter ring for use in automobile engines for tariff purposes is a filter classified under subheading 8421.31.0000, HTSUSA, as an intake air filter for internal combustion engines.

HOLDING:

The reticulated foam filter ring is classified under subheading 8421.31.0000, HTSUSA, as centrifuges, including centrifugal dryers; filtering or purifying machinery and apparatus, for liquids or gases; parts thereof: filtering or purifying machinery and apparatus for gases: intake air filters for internal combustion engines. The 2004 column one, general duty rate is 2.5% *ad valorum*. Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUSA and the accompanying duty rates are provided on the World Wide Web at *www.usitc.gov*.

EFFECT ON OTHER RULINGS:

NY K80327 dated November 21, 2003, is **revoked.**

MYLES B. HARMON,
Director,
Commercial Rulings Division.

PROPOSED MODIFICATION OF RULING LETTER AND REVOCATION OF TREATMENT RELATING TO CLASSIFICATION OF FRUITS IN ACETIC ACID

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of proposed modification of ruling letter and revocation of treatment relating to the classification of a mixture of fruits and edible plant parts in acetic acid.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) intends to modify a ruling letter pertaining to the tariff classification, under the Harmonized Tariff Schedule of the United States (HTSUS), of a mixture of fruits and edible plant parts in acetic acid and to revoke any treatment previously accorded by CBP to substantially identical transactions. Comments are invited on the correctness of the proposed action.

DATE: Comments must be received on or before January 14, 2005.

ADDRESS: Written comments are to be addressed to the U.S. Customs and Border Protection, Office of Regulations and Rulings, Attention: Regulations Branch, 1300 Pennsylvania Avenue, N.W., Mint Annex, Washington, D.C. 20229. Submitted comments may be inspected at U.S. Customs and Border Protection, 799 9th Street, N.W., Washington, D.C. during regular business hours. Arrangements to inspect submitted comments should be made in advance by calling Mr. Joseph Clark at 202–572–8768.

FOR FURTHER INFORMATION CONTACT: Peter T. Lynch, General Classification Branch, 202–572–8778.

SUPPLEMENTARY INFORMATION:

Background

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "**informed compliance**" and "**shared responsibility**." These concepts are premised on the idea that in order to maximize voluntary compliance with customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on CBP to provide the public with improved information concerning the trade community's responsibilities and rights under the customs and related laws. In addition, both the trade and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended, (19 U.S.C. 1484) the importer of record is responsible for using reasonable care to enter,

classify and value imported merchandise, and provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, this notice advises interested parties that CBP intends to modify a ruling letter pertaining to the tariff classification of a mixture of fruits and edible plant parts in acetic acid. Although in this notice CBP is specifically referring to one ruling, New York Ruling Letter (NY) J87437, dated October 27, 2003, this notice covers any rulings on this merchandise which may exist but have not been specifically identified. CBP has undertaken reasonable efforts to search existing data bases for rulings in addition to the one identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice, should advise CBP during this notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, CBP intends to revoke any treatment previously accorded by CBP to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, CBP personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or CBPs previous interpretation of the HTSUS. Any person involved in substantially identical transactions should advise CBP during this notice period. An importer's failure to advise CBP of substantially identical transactions or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importer or their agents for importations of merchandise subsequent to this notice.

In NY J87437, dated October 27, 2003, the classification of a product identified by the importer as Item No. OV–204296B containing cranberries, apricots and rosemary in liquid containing acetic acid was determined to be in heading 2001.90.3800, HTSUS, which provides for other vegetables prepared or preserved by vinegar or acetic acid. This ruling letter is set forth in "Attachment A" to this document. Since the issuance of that ruling, CBP has had a chance to review the classification of this merchandise and has determined that the classification is in error. None of the articles contained in the product are vegetables. Cranberries and apricots are fruits, and rosemary is an herb. Fruits and other edible parts of plants prepared or preserved by vinegar or acetic acid are classified in subheading 2001.90.60, HTSUS.

CBP, pursuant to 19 U.S.C. 1625(c)(1), intends to modify NY J87437, and revoke any other ruling not specifically identified to reflect the proper classification of the merchandise pursuant to the analysis set forth in proposed Headquarters Ruling Letter (HQ) 967015 (*see* "Attachment B" to this document). Additionally, pursuant to 19 U.S.C. 1625(c)(2), CBP intends to revoke any treatment previously accorded by CBP to substantially identical transactions. Before taking this action, consideration will be given to any written comments timely received.

Dated: November 29, 2004

John Elkins for MYLES B. HARMON,
Director,
Commercial Rulings Division.

Attachments

[ATTACHMENT A]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,

NY J87437
October 27, 2003
CLA–2–20:RR:NC:2:228 J87437
CATEGORY: Classification
TARIFF NO.: 2001.90.3800, 2103.90.8000

MR. SHACHAR GAT
SHONFELD'S USA, INC.
16871 Noyes Avenue
Irvine, CA 92606

RE: The tariff classification of preserved vegetables and fruit from China.

DEAR MR. GAT:

In your letter dated July 14, 2003, you requested a tariff classification ruling.

Samples and illustrative literature were submitted with your letter. One of the samples was forwarded to the Customs laboratory for analysis. The other sample was examined and disposed of. Item no. OV–204296A contains strawberries and rosemary in canola oil. Item no. OV–204296B consists of cranberries, rosemary, and apricots, in a liquid medium. The products are put up in glass bottles measuring 12 inches tall and 2 inches wide at the base. Laboratory analysis found item no. OV–204296B contained 4.96 percent acetic acid.

The applicable subheading for item no. OV–204296B will be 2001.90.3800, Harmonized Tariff Schedule of the United States (HTS), which provides for

vegetables, fruit, nuts and other edible parts of plants, prepared or preserved by vinegar or acetic acid . . . other . . . vegetables . . . other. The rate of duty will be 9.6 percent ad valorem.

The applicable subheading for item no. OV–204296A will be 2103.90.8000, HTS, which provides for Mixed condiments and mixed seasonings: Other: Mixed condiments and mixed seasonings . . . other. The rate of duty will be 6.4 percent ad valorem.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Stanley Hopard at 646–733–3029.

ROBERT B. SWIERUPSKI,
Director,
National Commodity Specialist Division.

[ATTACHMENT B]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,

HQ 967015
CLA–2 RR:CR:GC 967015ptl
Category: Classification
TARIFF NO.: 2101.90.6000

MR. SHACHAR GAT
SHONFELD'S USA, INC.
16871 Noyes Avenue
Irvine, CA 92606

RE: Fruit and Herbs Preserved in Acetic Acid; Modification of NY J87437

DEAR MR. GAT:

On October 27, 2003, the National Commodity Specialist Division of Customs and Border Protection (CBP) in New York, issued ruling J87437 which contained the classification under the Harmonized Tariff Schedule of the United States (HTSUS) of two articles. The articles were identified using your product item number. According to NY J87437, Item # OV–204296A contained strawberries and rosemary in canola oil and was classified in subheading 2103.90.8000, HTSUS, which provides for mixed condiments and mixed seasonings . . . other. The other article, Item # OV–204296B contains cranberries, rosemary, and apricots in a 4.96 percent acetic acid liquid. That article was classified in subheading 2001.90.3800, HTSUS, which provides for vegetables, fruit, nuts and other edible parts of plants, prepared or preserved by vinegar or acetic acid . . . other . . . vegetables . . . other. Since NY J87437 was issued, CBP has reviewed the classification of Item # OV–204296B and determined that it is incorrect for the reasons stated below.

The classification of the other article classified in NY J87437, OV–204296A, is not affected by this letter.

FACTS:

You have described Item # OV–204296B as being a 500 ml bottle containing cranberries, rosemary, and apricots in a 4.96 percent acetic acid liquid. CBP Laboratory Report NY20031265, dated September 26, 2003, reports that the article contains 4.96 percent acetic acid by weight. Cranberries and apricots are fruits. Rosemary is an herb.

ISSUE:

What is the classification of fruits and an herb prepared or preserved in a solution that is 4.96 percent acetic acid by weight?

LAW AND ANALYSIS:

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) in accordance with the General Rules of Interpretation (GRIs). The systematic detail of the HTSUS is such that most goods are classified by application of GRI 1, that is, according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied in order.

The HTSUS subheadings under consideration are as follows:

2001	Vegetables, fruit, nuts and other edible parts of plants, prepared or preserved by vinegar or acetic acid:
	* * *
2001.90	Other:
	Other:
	Vegetables:
	* * *
2001.90.3800	Other
2001.90.6000	Other

The CBP Laboratory analysis performed on the product indicates that it consists of ingredients that have been prepared or preserved by acetic acid. Therefore, the product is a good of heading 2001, HTSUS. The ingredients that have been prepared or preserved by the acetic acid are cranberries and apricots. These are fruits, products of chapter 8. The additional ingredient, rosemary, is an herb, an edible plant which would, if alone, be classified in chapter 12. Because none of the ingredients of the product are vegetables, the product itself cannot be classified in a subheading which provides for vegetables. Instead, the product is classified in the residual subheading 2001.90.60, HTSUS, which provides for other products.

HOLDING:

The article in NY J87437, identified as Item # OV–204296B containing cranberries, apricots and rosemary, in a 4.96 percent acid liquid is classified in subheading 2001.90.6000, HTSUSA, which provides for: Vegetables, fruit,

nuts and other edible parts of plants, prepared or preserved by vinegar or acetic acid, other, other, other. The 2004 duty rate will be 14 percent *ad valorem*. Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on the World Wide Web at www.usitc.gov.

NY J87437, dated October 27, 2003, is modified in accordance with this decision.

MYLES B. HARMON,
Director,
Commercial Rulings Division.

United States Court of International Trade

One Federal Plaza
New York, NY 10278

Chief Judge

Jane A. Restani

Judges

Gregory W. Carman
Thomas J. Aquilino, Jr.
Donald C. Pogue
Evan J. Wallach
Judith M. Barzilay
Delissa A. Ridgway
Richard K. Eaton
Timothy C. Stanceu

Senior Judges

Nicholas Tsoucalas
R. Kenton Musgrave
Richard W. Goldberg

Clerk

Leo M. Gordon

Slip Op. 04–146

JAZZ PHOTO CORPORATION, Plaintiff, v. UNITED STATES, Defendant.

Court No. 04–00494
Before: Judge Timothy C. Stanceu
PUBLIC VERSION

[Judgment granted for plaintiff in part and for defendant in part]

Decided: November 17, 2004

Neville Peterson LLP (*John M. Peterson, George W. Thompson, Curtis W. Knauss, Maria E. Celis* and *Catherine Chess Chen*) for plaintiff.

Peter D. Keisler, Assistant Attorney General, David M. Cohen, Director, *Patricia M. McCarthy*, Assistant Director, *Stefan Shaibani* and *David S. Silverbrand*, Trial Attorneys, Commercial Litigation Branch, Civil Division, United States Department of Justice; *Beth Brotman* and *Paul Pizzeck*, United States Customs and Border Protection, Department of Homeland Security, of counsel, for defendant.

Stroock & Stroock & Lavan LLP (*Matthew W. Siegal* and *Lawrence Rosenthal*) and *Adduci, Mastriani & Schaumberg, L.L.P.* (*Harvey Fox* and *Will E. Leonard*) for *amicus curiae*, Fuji Photo Film Co., Ltd.

OPINION

STANCEU, Judge:

Plaintiff Jazz Photo Corporation ("Jazz") is an importer of "lens-fitted film packages" ("LFFPs"), more commonly known as "disposable cameras," "single use cameras," or "one-time use cameras." In this case, Jazz contests the denial by U.S. Customs and Border Protection ("Customs") of its administrative protest, in which it challenged decisions made by Customs on September 24 and 26, 2004, to exclude from entry two shipments of Jazz's LFFPs that were entered at the Port of Los Angeles/Long Beach on August 26 and 27, 2004, respectively. Customs acted on its conclusion that Jazz had failed to prove its imported cameras were outside the scope of a general exclusion order issued in 1999 by the U.S. International Trade Commission ("ITC") under Section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337 (2000) ("Section 337"). *See In the Matter*

of Certain Lens-Fitted Film Packages, USITC Inv. No. 337–TA–406, Pub. No. 3219 (1999). The ITC's general exclusion order applies to LFFPs produced and imported by 26 parties, including Jazz, who participated as respondents in Section 337 proceedings initiated by Fuji Photo Film Co., Ltd. ("Fuji"), the holder of various patents used in manufacturing LFFPs.[1] In those proceedings and an enforcement proceeding conducted earlier this year, the ITC determined that disposable cameras imported by Jazz infringed patents held by Fuji.

All of the Jazz cameras at issue are "reloaded" cameras (also known as "refurbished" cameras), *i.e.*, the cameras initially were manufactured by Fuji or one of its licensees (Kodak, Concord, or Konica) and, after being used by consumers and collected following photo processing, were fitted with new film and, in some instances, new flash batteries. Jazz obtained the reloaded cameras from Polytech Enterprise Limited ("Polytech"), which processed the subject cameras at its facility in China. That processing, the nature of which is one of the issues in contention in this case, consisted of various operations which, in addition to film and battery replacement, were required to produce a functional and marketable camera. The processing included repair to the camera case to exclude light following the film reloading operation, repackaging, and relabeling under Jazz's trademark. Also at issue in this case are the circumstances under which spent disposable cameras, known in the trade as "shells," were collected for use in Polytech's reloading operations.

Under Section 337, Customs is charged with enforcing the ITC's general exclusion order with respect to imported disposable cameras offered for admission into the United States. To demonstrate that the cameras in the two entries at bar are entitled to admission under the ITC's general exclusion order, Jazz must establish that the shells used by Polytech to produce the reloaded cameras resulted from disposable cameras that had undergone a patent-exhausting "first sale" in the United States. To be "patent-exhausting," the sale in the United States must be made under the authority of Fuji or one of its licensees. Jazz also must demonstrate that the processing Polytech performed to reload the cameras was a "permissible repair" of the original camera as opposed to a "prohibited reconstruction." Both of these requirements stem from the decision of the U.S. Court of Appeals for the Federal Circuit in *Jazz Photo Corp. v. Int'l Trade Comm'n*, 264 F.3d 1094 (Fed. Cir. 2001), *cert. denied*, 536 U.S. 950 (2002). There, the Court of Appeals, in reviewing the underlying general exclusion order, reversed the ITC's judgment of patent infringement regarding LFFPs for which the patent rights were exhausted by first sale in the United States, and that were permissibly repaired. *Id.* at 1110.

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[1] Fuji has been granted *amicus curiae* status in this proceeding.

The court exercises jurisdiction over this matter pursuant to 28 U.S.C. § 1581(a) (2000). The court set an expedited trial schedule with the consent of both parties.[2] At a four-day bench trial held October 12–14 and October 18, 2004, plaintiff produced evidence establishing permissible repair for all of the cameras in the two entries. Plaintiff produced evidence sufficient to establish "first sale" for only some of the subject cameras, as identified further in this opinion. Defendant United States presented no case in chief and instead relied principally on its cross-examination of the two witnesses called by Jazz at trial, and on its interpretation of the "first sale" requirement as addressed by the Court of Appeals for the Federal Circuit, to support its contention that Jazz failed to meet its burden of proof as to any camera offered for admission.

The court concludes, based on the record made in these proceedings, that only the aforementioned cameras for which plaintiff produced evidence sufficient to establish "first sale" in the United States qualify for admission, and only to the extent that the court has identified those specific cameras as capable of being segregated from the remaining cameras in the two shipments. The court concludes that those remaining cameras are required to be exported or otherwise disposed of according to applicable customs laws.

I. BACKGROUND

This litigation did not arise in isolation. Its roots are in other proceedings in which Fuji claimed that Jazz's business activities involving single use cameras infringed its patent rights.

In the 1999 Section 337 action mentioned above, Fuji charged that 27 respondents, including Jazz, were infringing fifteen of Fuji's patents. The ITC found infringement on the part of 26 respondents, including Jazz, and on June 2, 1999 issued its General Exclusion Order and Order to Cease and Desist ("Exclusion Order") that, *inter alia*, prohibited the importation into the United States of "Certain Lens-Fitted Film Packages." The Court of Appeals for the Federal Circuit stayed the Exclusion Order pending appeal. *See Jazz Photo Corp. v. Int'l Trade Comm'n*, 264 F.3d at 1098. The Court of Appeals affirmed the Commission's orders; however, it provided for one exception to the Exclusion Order, holding that "[t]he [ITC's] judgment of patent infringement is reversed with respect to LFFPs for which

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[2] By the time Customs excluded the merchandise, plaintiff already had commenced an action in this court, Court No. 04–00442, claiming jurisdiction under 28 U.S.C. § 1581(I) and seeking expedited relief. That action addressed six entries of Jazz disposable cameras, including the two at issue herein. After Customs, on September 29, 2004, denied plaintiff's protest of the decision to exclude those two entries, plaintiff initiated this case, filing its complaint on October 4, 2004. Pursuant to the expedited trial schedule, the parties conducted an accelerated discovery process, during which defendant took depositions of the two witnesses who testified at trial.

the patent right was exhausted by first sale in the United States, and that were permissibly repaired." *Id.* at 1110.

In addressing the questions of first sale and permissible repair, the Court of Appeals for the Federal Circuit stated the general rule that "patented articles when sold 'become the private individual property of the purchasers, and are no longer specifically protected by the patent laws.' " *Id.* at 1102 (*quoting Mitchell v. Hawley*, 83 U.S. (16 Wall) 544, 548 (1872)). "The purchaser of a patented article has the rights of any owner of personal property, including the right to use it, repair it, modify it, discard it, or resell it, subject only to overriding conditions of the sale." *Id.* The Court then addressed two specific questions arising from the application of this general principle of patent law to the single use cameras imported by Jazz. First, it addressed what "repair" of a single use camera is permissible under the patent laws. Second, it defined what type of sale is "patent-exhausting," *i.e.*, the Court resolved the issue of the type of sale needed for the purchaser to obtain the full scope of rights, including the right to repair as well as the right to use and resell, that will attach only when an article no longer has patent protection.

The Court of Appeals analyzed in detail the distinction patent law draws between "permissible repair" and "prohibited reconstruction." The Court specified that an eight-step process undertaken by Jazz would qualify for permissible repair, as follows: (1) removing the cardboard cover; (2) opening the body of the shell (usually by cutting at least one weld); (3) replacing the winding wheel or modifying the film cartridge to be inserted; (4) resetting the film counter; (5) replacing the battery in a camera equipped with a flash; (6) winding new film out of a cannister onto a spool or into a roll; (7) resealing the camera body using tape and/or glue; and (8) applying a new cardboard cover. *Jazz Photo Corp. v. Int'l Trade Comm'n*, 264 F.3d at 1101.

Regarding the "first sale" issue, the Court of Appeals for the Federal Circuit, settling a previously open question of patent law, held that

> [t]o invoke the protection of the first sale doctrine, the authorized first sale must have occurred under the United States patent. Our decision applies only to LFFPs for which the United States patent rights have been exhausted by first sale in the United States. Imported LFFPs of solely foreign provenance are not immunized from infringement of United States patents by the nature of their refurbishment.

Id. at 1105 (citation and parenthetical omitted).

While Jazz's appeal of the ITC Exclusion Order was pending, Fuji filed a second action with the ITC seeking "institution of a formal enforcement proceeding to enforce the exclusion and cease and desist orders, which [were] issued on June 2, 1999, impos[ition of] civil pen-

alties, and impos[ition of] such other remedies and sanctions as are appropriate against Jazz and several other entities." *ITC Enforcement Initial Determination*, USITC Inv. No. 337–TA–406 (Apr. 6, 2004). The ITC administrative law judge found that Jazz had violated the Exclusion Order with respect to some of its product imported from various facilities in the People's Republic of China ("China"). *See ITC Enforcement Initial Determination* at 149. The ITC Enforcement Initial Determination effectively became the determination of the Commission when the ITC issued a notice declining to review the Enforcement Initial Determination on July 27, 2004. *Determination Not To Review the Presiding Administrative Law Judge's Enforcement Initial Determination and Request for Briefing on Recommended Enforcement Measures on Certain Lens-Fitted Film Packages*, 69 Fed. Reg. 46,179 (Aug. 2, 2004).

In addition to the actions it had brought before the ITC, Fuji sued Jazz for patent infringement in the U.S. District Court for New Jersey. *See Fuji Photo Film Co. Ltd. v. Jazz Photo Corp.*, 249 F. Supp. 2d 434 (D. N.J. 2003). The District Court, after a jury trial, found Jazz "liable for infringement of Fuji's patents with respect to 40,928,185 cameras sold by Jazz during the period 1995 through August 21, 2001." *Id.* at 459. The District Court set damages owed by Jazz at $22,919,783.60. The Court also found Jazz's president personally liable for inducement of infringement with respect to 39,103,664 of the cameras, and held him jointly and severally liable for an amount of $21,898,051.84. *Id.* at 459–60. The District Court judgment apparently contributed to a decision by Jazz to seek protection under chapter 11 of Title 11, United States Code.

Jazz is now the subject of ongoing bankruptcy proceedings in the Bankruptcy Court for the District of New Jersey. On August 2, 2004, Fuji, a creditor participating in those proceedings, filed a motion to convert the proceedings from reorganization under chapter 11, to liquidation under chapter 7, of Title 11, United States Code. In this Court, Jazz has argued that it will have no means of staying in business and avoiding bankruptcy under chapter 7 should it be unsuccessful in obtaining the immediate release of its merchandise.

II. Summary of Contentions of the Parties

In its argument before this Court, Jazz submits that the subject imported merchandise reflects modifications Jazz made in its business operations to correct the circumstances that caused the ITC and the District Court for New Jersey to conclude that certain previous imports of Jazz's disposable cameras infringed Fuji's patents. By way of background, the ITC considered, and found infringing, reloaded LFFPs imported and sold by Jazz that fall into four categories: (1) cameras refurbished using shells that had been collected outside the United States; (2) cameras that had been refurbished more than once (so-called "reloaded reloads"); (3) Kodak cameras

which, when undergoing the refurbishing process abroad, had been fitted with a full-width replacement back for the camera case that was not produced by Fuji or a Fuji licensee and that infringed a Fuji patent; and (4) cameras for which Jazz was unable to show evidence that the refurbishing constituted "permissible repair."

Jazz maintains that it has established, by a preponderance of the evidence, that the cameras in the two entries at issue were refurbished only from shells collected in the United States, that in sorting the shells the supplier of the refurbished cameras, Polytech, excluded from processing shells that were previously reloaded, that Polytech did not use any full-width replacement backs in making the subject merchandise, and that the refurbishing process conformed to the standard of "permissible repair." Defendant United States asserts generally that Jazz has failed to meet its burden of proof for either "first sale" or "permissible repair." The United States further argues that this Court, in the event it orders the release of any merchandise, should grant no expedited relief to Jazz, disputing plaintiff's contentions about Jazz's precarious financial status.

III. Applicable Legal Standards

The court reviews *de novo* the protested decision by Customs to exclude the subject merchandise. *See* 28 U.S.C. § 2640(a)(1). For purposes of this review, the factual determinations by Customs are presumed to be correct. 28 U.S.C. § 2639(a)(1). To overcome this presumption, Jazz must establish, by a preponderance of the evidence, that the single use cameras qualify for admission. *See St. Paul Fire & Marine Ins. Co. v. United States*, 6 F.3d 763, 769 (Fed. Cir. 1993) (holding that the preponderance of the evidence standard is the adequate burden of persuasion for factual matters in post-importation cases). Under the requirements found by the Court of Appeals for the Federal Circuit in *Jazz Photo Corp. v. Int'l Trade Comm'n*, plaintiff must establish that each individual camera offered for admission underwent a patent exhausting first sale in the United States and that the processing performed by Polytech in China was confined to "permissible repair," *i.e.*, that it did not constitute "prohibited reconstruction."

A. The Requirement of a Patent-Exhausting "First Sale"

The court takes judicial notice that Jazz, in marketing LFFPs reloaded from the shells manufactured by or under license of Fuji, does not have access to documentary evidence, such as sales receipts, establishing the location of the original sale.[3] This conclusion stems from the practical consideration that Jazz and similar companies

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[3] The court's judicial notice is informed by consideration of this question by another court. The District Court for New Jersey has rejected the view that "first sale" must be es-

must obtain shells, directly or indirectly, from the businesses that develop the film in the LFFPs. The court takes further judicial notice that, as any consumer of a disposable camera knows from experience, if not from the label on the camera itself, the photo processor typically retains the spent shell when the consumer receives the prints or negatives.

A second practical consideration, stemming at least in part from the protracted litigation between Fuji and Jazz, is that Jazz and similarly situated companies cannot reasonably be expected to have access to information that does or may exist, and would be expected to be proprietary to Fuji and the licensees, from which the location of first sale of a shell could be ascertained to a certainty. In order for the "permissible repair" exception identified and delineated by the Court of Appeals for the Federal Circuit in *Jazz Photo Corp. v. Int'l Trade Comm'n* to have any practical meaning in commerce, Jazz must be permitted to conduct its business such that "first sale" may be established on the basis of evidence that is commercially available to it.

As a threshold consideration, the court is unable to presume that a shell collected from any source in the United States, and not previously reloaded, resulted from a single use camera that underwent a patent-exhausting first sale in the United States. The court finds no support in the Federal Circuit's opinion in *Jazz Photo Corp. v. Int'l Trade Comm'n*, or in the Exclusion Order, for such a general presumption. Rather, the court concludes from these sources of law that Jazz must meet its evidentiary burden through factual evidence establishing first sale that goes beyond the mere fact that the shells were obtained in the United States.

However, Jazz argues, and the court agrees, that Jazz should be entitled to rely on a "presumption of regularity" under which Customs must be presumed to be enforcing the Exclusion Order. Under such a presumption, any new single use cameras identified by the Exclusion Order that are commercially imported by anyone other than Fuji or one of its licensees would be unlawful imports and presumed to be excluded from the U.S. market.[4] Because the Exclusion Order contains an exception allowing noncommercial ("personal use") importations, this presumption does not extend to the LFFPs, which may be called "tourist" cameras, that are imported under that

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tablished with direct evidence of the first sale such as a sales receipt. *See Fuji Photo Film Co. Ltd. v. Jazz Photo Corp.*, 249 F. Supp. 2d at 451–52.

[4] In a recent decision, the Court of Appeals for the Federal Circuit rejected an argument by Fuji that this presumption of regularity is unwarranted. *See Fuji Photo Film Co., Ltd. v. Int'l Trade Comm'n*, 386 F.3d 1095, 1107 (Fed. Cir. 2004) ("To the extent that Fuji's argument is directed at a perceived lack of resources or competence on the part of the Customs Service, we cannot address that problem through a judicial directive that would, in effect, require the Commission to alter its practices based on our unsupported suspicion that the Customs Service is incapable of performing the duties Congress has assigned to it.").

exception. The court addresses below the legal issues posed by previously-reloaded shells and by noncommercial importations. Following this discussion, the court addresses the remaining legal issues posed by the facts in this case as they pertain to the circumstances under which the shells used to produce Jazz's imported cameras were collected.

1. The "Reloaded Reload" Issue

In this proceeding, Jazz acknowledges that a shell from a "reloaded" camera, as opposed to a new camera, is not entitled to a presumption of patent-exhausting first sale, as such a shell could have resulted from a single use camera previously imported and found to have infringed Fuji's patents. Instead, Jazz points to record evidence of a sorting operation conducted on the shells prior to the processing that refurbishes them with new film and, where applicable, flash batteries. That sorting operation, according to Jazz, reliably excludes from processing shells from reloaded cameras, based on physical indications of the previous reloading, such as the presence of black tape, the presence of replacement parts, or the absence of an original label of Fuji or one of its licensees. As discussed later in this opinion, Jazz at trial met its burden of establishing that its operations satisfactorily addressed the "reloaded reload" issue.

2. The "Tourist Camera" Issue

In these proceedings, the parties devoted considerable argument to the issue of shells from what may be called "tourist cameras." Jazz acknowledges, as a general matter, that some shells collected in the United States, even though processed by a film developer in the United States, may nevertheless have been first sold abroad. Such a shell would result, for example, if a U.S. tourist purchased and used a disposable camera in a foreign country and brought it back to the United States for developing of the film. The camera in its original condition could have been imported lawfully under the personal use exception in the Exclusion Order. The parties disagree on whether the resulting shell, if exported and permissibly repaired, would qualify for admission to the United States under the Exclusion Order. Jazz maintains that such a camera would be deemed under patent law principles not to violate the Exclusion Order. Jazz argues in the alternative that if the court should find to the contrary, it nevertheless should conclude that Jazz has met its evidentiary burden by presenting evidence that the sorting operation conducted on the shells prior to the processing, mentioned above, also is sufficiently reliable to exclude shells that contain labeling in a foreign language or are otherwise identifiable as being of models of LFFPs not typical of those found in the United States market.

The aforementioned "personal use," or "tourist camera," exception, set forth in paragraph four of the Exclusion Order, provides that the LFFPs

> are entitled to entry for consumption into the United States, without payment of bond, if upon importation they accompany a person arriving in the United States and are for the arriving person's personal use, or which are otherwise imported into the United States in such small quantities and under such circumstances so as to reasonably indicate to the satisfaction of the U.S. Customs Service that they are being imported for personal use rather than for commercial purposes.

The Exclusion Order was issued before the Court of Appeals for the Federal Circuit, in *Jazz Photo Corp. v. Int'l Trade Comm'n*, 264 F.3d 1094, held that permissibly repaired LFFPs that underwent a patent-exhausting first sale constitute an exception to its general finding that the imported LFFPs at issue infringed Fuji's patent rights. Under the clear holding of the Court of Appeals, a LFFP must undergo a patent-exhausting first sale in the United States to qualify for permissible repair. It is just as clear that LFFPs brought in under the "tourist" exception in paragraph four of the Exclusion Order do not meet this test. These two conclusions, however, do not resolve entirely the legal question posed by the factual situation of disposable cameras offered for importation into the United States after being refurbished abroad using "tourist shells" collected from U.S. photo processors, a situation not addressed anywhere in the Exclusion Order. Nor does the legal question posed by such cameras appear to have been before the Court of Appeals in *Jazz Photo Corp. v. Int'l Trade Comm'n*, 264 F.3d 1094.

This court concludes that, in resolving the dispute between the parties in this case, it need not decide the issue of whether shells from "tourist cameras," in all circumstances and as a matter of law, may be exported from the United States, refurbished, and reimported lawfully under the Exclusion Order. That conclusion is grounded in the particular findings of fact identified later in this opinion. The court notes, in particular, the absence of any record evidence from which it could conclude that a camera made from a "tourist" shell actually is present in either of the entries of merchandise at issue. As also discussed later in this opinion, the only evidence of record bearing on the question of the likelihood of the presence of tourist shells among collections of shells obtained from photo processors in the United States supports a finding of fact that tourist shells may be present at a percentage that is "very small, much less than one percent." A third group of findings relevant to the tourist camera question pertain to the evidence of sorting conducted by Polytech, Jazz's Chinese supplier of refurbished cameras. Under the particular factual circumstances that plaintiff, by a preponderance of the evi-

dence, established to exist in this case for a portion of the cameras offered for importation, the "first sale" requirement has been met.

Because it would have simplified the issues presented by this case were the court able to accept plaintiff's arguments that cameras refurbished from tourist camera shells collected from U.S. photo processors may lawfully be entered for consumption, it is helpful to address the arguments and the reasons why the court concludes that plaintiff's arguments do not suffice. As a threshold consideration, the court notes that the questions of law properly before it concern the enforcement by Customs of the Exclusion Order as modified by the Court of Appeals. It is not the role of this Court or of Customs to settle questions of intellectual property law. *See K Mart Corp. v. Cartier, Inc.*, 485 U.S. 176, 189 (1988). Thus, it is not within the power of this Court in the first instance to determine whether, as a matter of patent law, Fuji's patent rights in tourist cameras or shells of tourist cameras have been extinguished under some principle distinct from the exhaustion by "first sale" principle or any other patent law principle unrelated to the application of the Exclusion Order. As a result, defenses to infringement that Jazz could have asserted before the ITC in the Section 337 proceeding, and thereafter raised on appeal before the Federal Circuit, will not be availing in this forum. That still leaves for this court's consideration, however, the arguments advanced by plaintiff that stem from the personal use exception itself or from the ITC's Section 337 proceeding and Jazz's subsequent appeal of the ITC's decisions affecting its imports in *Jazz Photo Corp. v. Int'l Trade Comm'n*, 264 F.3d 1094.

Plaintiff's first argument is that the Exclusion Order, by explicitly creating the exception for personal use imports, implicitly approves of the use of tourist cameras for any purpose including repair and reimportation. The court finds no basis to conclude that the Exclusion Order, by excepting from the import exclusion the importation of cameras for personal use, had any legal effect beyond the express terms of paragraph four therein. Section 337 proceedings are based in patent law; however, they are not identical to patent law. A decision by Customs to enforce or not enforce the full scope of the patent holder's rights to control the sale, use and manufacture of the merchandise in question does not affect other rights held by the patent holder. *See Corning Glass Works v. U.S. Int'l Trade Comm'n*, 799 F.2d 1559, 1571–72 (Fed. Cir. 1986) (noting that ITC decision not to issue an exclusion order does not sanction the infringement of U.S. patents by importers). On its face, the exception to the Exclusion Order applies only to those cameras being imported for personal use. When a refurbished camera is imported for commercial purposes, the exception does not apply. To qualify for entry for consumption in the Customs territory, a disposable camera must comply with the Exclusion Order as a whole.

Jazz's second argument is that Fuji gave an implied license of its patent rights by not seeking an import exclusion for tourist cameras in the Section 337 proceeding. Patent law, however, does recognize the possibility of an implied license. *See De Forest Radio Tel. Co. v. United States*, 273 U.S. 236 (1927). The common thread of implied license claims is equitable estoppel. "Thus, an implied license cannot arise out of the unilateral expectations or even reasonable hopes of one party. One must have been led to take action by the conduct of the other party." *H.M. Stickle v. Heublein, Inc.*, 716 F.2d 1550, 1559 (Fed. Cir. 1983). There is no evidence in the record that Fuji took any action, upon which Jazz reasonably could have relied, that implied a waiver of Fuji's rights. Decisions as to the scope of the enforcement of an exclusion order are within the purview of Customs and the ITC. Typically, an implied license is found by determining "what the parties reasonably intended as to the scope of the implied license based on the circumstances of the sale." *Carborundum Co. v. Molten Metal Equip. Innovations, Inc.*, 72 F.3d 872, 878 (Fed. Cir. 1995). In this instance, there was no sale from Fuji to Jazz to examine. The sale of the camera to a customer by the patent holder or a licensee does not create an implied license that a third party can rely upon when that sale occurs in a foreign country. *See Jazz Photo Corp. v. Int'l Trade Comm'n*, 264 F.3d at 1105.

Third, and related to the second theory, plaintiff maintains that the ITC and Customs, by not enforcing Fuji's rights through an exclusion of the tourist cameras, has created a waiver of those rights. If the relationship between Fuji and Jazz is not sufficient grounds to establish an implied license, then actions by a third party, Customs in this case, cannot impose on a patent holder a waiver of patent rights. Customs and the ITC can exercise their discretion not to use their powers to enforce those rights, but that does not waive Fuji's ability to pursue those rights in other fora. *See Corning Glass Works*, 799 F.2d at 1571–72. The court finds no legal authority allowing it to conclude that either the Exclusion Order by itself, or actions by Customs to permit importation of LFFPs for personal use, established an implied waiver of Fuji's patent rights.

Fourth, Jazz maintains that by failing to bring any action under domestic patent law that would seek to prevent the use or sale of the personal use cameras while they are in the United States, Fuji has abandoned any right to object to Jazz's subsequent action relying on the legal collection of the shells in the United States. The parties apparently disagree as to whether Fuji could bring an action under the patent laws to prevent the use by consumers of the personal use LFFPs imported under paragraph four of the Exclusion Order; both parties agree that Fuji has not done so. Plaintiff's contention essentially is that if, *arguendo*, Fuji could bring such an action or an action to enjoin photo processors from selling spent tourist shells, its failure to do so has constituted a waiver of those rights. However,

the court finds no legal authority under which it could conclude that Fuji's failure to take either of these steps creates any such waiver.

The remaining arguments Jazz advances on the tourist camera issue pertain to its contention that any cameras refurbished from tourist camera shells would exist, if at all, only in *de minimis* quantities. Actions arising under section 337 do include an implicit *de minimis* exception. This stands in contrast to traditional patent law, which holds that any infringing product creates a cause of action. Under section 337, only those imports which cause substantial injury will prompt the ITC to issue an exclusion order. *See Corning Glass Works*, 799 F.2d at 1567 ("[T]o accept proof of a conceivable or actual loss of sales or profits of any amount by the patentee as sufficient proof of an effect or tendency to substantially injure the domestic industry would eliminate the 'independent proof' of the 'distinct injury requirement' held to be necessary in [*Textron, Inc. v. U.S. Int'l Trade Comm'n*, 753 F.2d 1019, 1028–29 (Fed. Cir. 1985)]."). It is therefore possible that the ITC could amend its Exclusion Order expressly to permit re-importation of the tourist cameras, finding that they do not create a substantial injury. However, that determination is within the power of the ITC, and not within the jurisdiction of this Court. The issue before this court is confined to the exercise by Customs of its authority to enforce the Exclusion Order as it applies to the subject single use cameras. To incorporate a *de minimis* exception into the Exclusion Order, Jazz must present its argument before the ITC, with any appeal therefrom brought in the Court of Appeals for the Federal Circuit.

Nevertheless, as noted earlier, there is no record evidence from which the court may conclude that the subject merchandise actually includes cameras refurbished from tourist shells. That, and the findings concerning the relative rarity of tourist shells, and concerning the sorting conducted to remove from processing those tourist shells presenting indications allowing them to be identified, are satisfactory to resolve the tourist camera issue as it is presented by the record evidence in this case.

Defendant United States made much of the possibility that some tourist cameras may be labeled in English because they were intended for sale in various English-speaking foreign countries, and of the likelihood that such shells could be selected for processing during the sorting procedure described at trial. Under defendant's argument, Jazz would be expected to arrange for foolproof sorting of shells based on information known to Fuji and its licensees, which information Jazz likely could not obtain. The court declines to disallow the entire "permissible use" exception, which the Court of Appeals conditioned on first sale in the United States, on the theoretical possibility that the entries at issue contain one or more cameras made from shells of tourist cameras collected in the United States. Were the court to impose a blanket prohibition upon such a theoreti-

cal possibility, it would be acting contrary to the intent the Court of Appeals demonstrated by going to the lengths it did to apply the permissible repair doctrine to the specific class of merchandise at issue in this case.

3. Collection of Shells in the United States

In the ITC enforcement proceeding, the administrative law judge concluded that forty percent of the LFPPs Jazz imported in the time period August 21, 2001 to December 12, 2003 were refurbished from shells of LFPPs for which the first sale occurred outside the United States. [.] *ITC Enforcement Initial Determination* at 43. Without specifying an exact percentage, the judge made a finding, based on an admission by Jazz, that "the primary source of foreign shells among samples of empty Jazz shells is the reloaded reloads." *ITC Enforcement Initial Determination* at 65.

Before the administrative law judge, Jazz contended that there was no practical means to differentiate between a shell sold abroad and one sold in the United States using nonproprietary information. *ITC Enforcement Initial Determination* at 35. The administrative law judge disagreed with Jazz, finding that with regard to Fuji, Kodak, and Konica, the language in which the package label is presented is an indication of the country in which the original manufacturer intended the LFFP to be sold. *ITC Enforcement Initial Determination* at 35. The administrative law judge observed that prior to the August 21, 2001 decision of the Court of Appeals in *Jazz Photo Corp. v. Int'l Trade Comm'n*, 264 F.3d 1094, Jazz relied on foreign collection of shells for ninety percent of its refurbished LFFPs. These previously reloaded foreign shells were found not to have been screened by Jazz from its shells collected in the United States, and they were found to have been the primary source of the LFFPs refurbished from foreign shells that were found in the sample of Jazz's LFFPs in the enforcement proceeding.

Before this court, Jazz argued that if it were to sort out from shells collected in the United States the two known sources of shells resulting from infringing LFFPs, *i.e.*, shells labeled in a foreign language and shells previously reloaded, then a presumption arises that the remaining shells were subject to a patent-exhausting first sale in the United States. The court disagrees.

A sorting process that removes foreign-language shells and previously reloaded shells, standing by itself, is not sufficient to establish first sale. Plaintiff did not make or attempt to make an evidentiary showing that LFFPs by the four original manufacturers (Fuji, Kodak, Konica and Concord) labeled in English are not sold in foreign countries. Therefore, the court does not have facts on the record supporting a finding that sorting is a foolproof method of identifying and sorting out shells from cameras first sold abroad. As counsel for the United States argued, sorting that excludes foreign-language

shells cannot identify shells that may have been sold abroad in an English-speaking country. Such shells could be imported into the domestic market and then sold to a company that refurbishes LFFPs. As plaintiff itself acknowledged during its closing argument at trial, shells may be imported into the United States without violating the Exclusion Order, which according to plaintiff does not apply to "Lens-Fitted Film Packages" that are not fitted with film. According to the ITC administrative law judge, there is a significant international market in used shells. *ITC Enforcement Initial Determination* at 65. The court infers from the existence of this market, and from the absence of a prohibition on the importation of shells into the United States, that a collection of shells obtained in the United States, from which previously reloaded shells and foreign-labeled shells have been removed, would not necessarily satisfy the first sale requirement. The court concludes, in the particular context of the facts established in this case, as set forth later in this opinion, that additional evidence is necessary to establish compliance with the first sale requirement. As discussed in detail in the Findings of Fact portion of this opinion, Jazz was able to demonstrate, for some but not all of its LFFPs in the two entries, that the shells used by Polytech in the refurbishing process not only were collected in the United States, but were collected, directly or indirectly, from entities engaged in the particular business of photo processing.

Collection from a photo processor located in the United States, combined with a system to sort out shells that previously were reloaded, would address the possible sources of shells from LFFPs first sold abroad, except for shells from LFFPs that entered the United States in violation of the Exclusion Order or entered the United States under the personal use exception in the Exclusion Order. As to the former, Jazz may rely on the aforementioned presumption of regularity that Customs is enforcing the clear terms of the Exclusion Order and preventing importation of infringing LFFPs sold outside the United States. *See Fuji Photo Co., Ltd. v. Int'l Trade Comm'n*, 386 F.3d 1095, 1107 (Fed. Cir. 2004). Concerning the latter, the "tourist camera" shells, sorting of shells so that those with original labels in a foreign language, or those with other indications that would reveal, based on nonproprietary information, that they are of a type not sold in the U.S. market, are not selected for processing is a practical means to remove "tourist camera" shells from the mix of collected shells.

Thus, shells collected, directly or indirectly, from a photo processor in the United States are far more reliable, from the standpoint of showing "first sale," than those that are shown to have been collected in the United States but that have no evidence linking them to a source in the United States that actually is in the photo processing business. It is theoretically possible that a U.S. photo processor could engage in the additional business of "international shell

arbitrage," *i.e.*, importing shells from abroad for resale to shell collectors or reloaders. The court, however, finds this hypothetical to be highly speculative. Defendant placed no evidence on the record in this proceeding to establish that such a scenario actually exists.

B. The Requirement of "Permissible Repair"

Polytech's camera refurbishing operations in China must comply with the requirement of "permissible repair," *i.e.*, the processing must not constitute "prohibited reconstruction." *Jazz Photo Corp. v. Int'l Trade Comm'n*, 264 F.3d at 1101. The Court of Appeals for the Federal Circuit identified, as permissible repair, the previously-mentioned eight-step process, which includes: (1) removing the cardboard cover; (2) opening the body of the shell (usually by cutting at least one weld); (3) replacing the winding wheel or modifying the film cartridge to be inserted; (4) resetting the film counter; (5) replacing the battery in a camera equipped with a flash; (6) winding new film out of a cannister onto a spool or into a roll; (7) resealing the camera body using tape and/or glue; and (8) applying a new cardboard cover.

In the proceedings in U.S. District Court for New Jersey, the permissible repair standard set forth by the Federal Circuit was further elucidated. The District Court identified a series of nineteen permissible steps that included operations incidental to the eight steps identified by the Court of Appeals. However, the District Court did not conclude that the nineteen steps it identified were exhaustive. The Court held that

> under the Federal Circuit's formulation in *Jazz v. ITC*, when a camera is opened, film is properly inserted, the battery is replaced, and the camera is closed, the camera has been permissibly repaired. These four permissible processes serve the function of preserving the remaining useful life of the camera as a whole.

Fuji Photo Film Co. Ltd. v. Jazz Photo Corp., 249 F. Supp. 2d at 445–46. The District Court further noted:

> Whether these refurbishment procedures are counted as four, eight or nineteen "steps" is a matter of semantics, as virtually any step can be divided into multiple "sub-steps." The legal issue is whether the totality of the refurbishment procedures are of such a nature that they preserve the useful life of the patented article, or whether they in fact recreate the article after it has become spent.

Id. at 446–47.

This court agrees with the District Court's analysis, noting that the opinion of the Court of Appeals for the Federal Circuit is not properly interpreted to disallow minor processing incidental to the

eight steps identified in the Court's opinion in *Jazz Photo Corp. v. Int'l Trade Comm'n*, 264 F.3d 1094.

IV. Findings of Fact on First Sale and Permissible Repair

At trial, Jazz produced two witnesses who testified on various factual matters relevant to the first sale and permissible repair issues. Jazz also introduced a large number of documents, almost all of which documents the court found admissible and, accordingly, admitted to the record. Defendant United States declined to put on a case in chief, instead relying largely on its cross-examination of plaintiff's two witnesses to support its contention that Jazz had failed to show that all the cameras at issue satisfied the first sale and permissible repair requirements. As a result, the critical evidence introduced by the plaintiff at trial in this case is unrebutted.

The court, after considering whether plaintiff has met its burden of proof by a preponderance of the evidence on each of the various factual issues in this case, has made individual findings of fact on the following core issues: (A) Whether Jazz has established a patent-exhausting first sale for any or all of the cameras at bar, based on the circumstances under which the shells used in processing were collected; and (B) Whether Jazz has established that Polytech's camera refurbishing operations qualify as "permissible repair" for any or all of those cameras. These core findings of fact, and certain related factual findings, are set forth in this section of the opinion.

The findings of fact reached by the court on issue (A), *i.e.*, "first sale," required the court to make findings of fact on a third issue. That issue is whether Jazz has demonstrated, by a preponderance of the evidence, that cameras refurbished from a group of shells obtained from a company known as Seven Buck's, Inc. can be segregated from the remaining cameras in the two shipments. A fourth factual issue pertains to a determination under USCIT R. 62 governing any stay affecting the time at which this court's judgment may be enforced. The findings of fact and conclusions of law pertaining to these two additional issues are set forth in subsequent sections of this opinion.

A. Findings of Fact Relevant to the Issue of First Sale in the United States

Plaintiff established at trial that the LFFPs in the two shipments at bar were refurbished in China by Polytech. Plaintiff also established that a portion of these LFFPs were refurbished by Polytech using shells that Polytech obtained from a collector of shells, Photo Recycling Enterprises, Inc. ("Photo Recycling"), a company headquartered in Piscataway, New Jersey. Plaintiff established that the remainder of the LFFPs at issue were refurbished by Polytech in China using shells that Jazz provided to Polytech after acquiring

them from the company known as Seven Buck's, Inc. ("Seven Buck's"), which operated in Newport Beach, California.

The court further finds, based on the records of plaintiff admitted into evidence and the testimony of the two witnesses at trial, that the LFFPs made from shells acquired from Seven Buck's were identified separately in plaintiff's inventory control system, which assigned to these LFFPs a "Master Lot Number" ("MLN"), and that they were identified in that inventory control system by Master Lot Number 463. The court further finds, based on plaintiff's records and the testimony of the two witnesses at trial, that plaintiff's inventory control system assigned Master Lot Numbers other than Master Lot Number 463 to the LFFPs in the two subject shipments that resulted from Polytech's refurbishing of shells acquired from Photo Recycling. The evidence establishes, as discussed later in this opinion, that the inventory control system using Master Lot Numbers enables finished LFFPs to be identified by Master Lot Number according to the shipments of shells from which they were refurbished by Polytech.

Based on a preponderance of the evidence presented at trial, the court finds as a fact that all the shells acquired from Photo Recycling that were used in refurbishing LFFPs in the two subject shipments were acquired, directly or indirectly, from entities that performed photo processing operations in the United States. With respect to any of the aforementioned shells that Polytech acquired from collectors of shells, instead of from U.S. photo processors, the court finds, based on a preponderance of the evidence, that a condition of the purchase of such shells was collection from photo processors in the United States.

The evidence supporting the aforementioned findings of fact and other findings of fact relevant to the issue of first sale is summarized below.

1. Findings of Fact Established by the Testimony of Mr. Leon Silvera

Jazz introduced at trial the testimony of Mr. Leon Silvera, President of Photo Recycling. The court found his testimony credible based on his demeanor, demonstrated knowledge of Photo Recycling's business activities, and general knowledge of the business of collecting spent shells. His testimony established, by a preponderance of the evidence, the following facts.

1. Photo Recycling is in the business of collecting spent shells from three distinct types of vendors. These vendors include (1) national retailers that operate internal photo processing labs (*e.g.*, CVS and COSTCO), (2) independent photo processors or small, wholesale photo finishing labs, and (3) entities that are in the business of collecting shells, otherwise known as shell collectors. Tr. 184–86.

2. Photo Recycling contracts a price for shells with individual vendors and sends each pre-paid, domestic UPS labels and cartons that most suppliers use to ship shells to Photo Recycling's warehouse in Piscataway, New Jersey. Tr. 188–89.
3. Approximately 80% of the shells collected by Photo Recycling in the United States in 2004 were obtained from the national retailers referred to in paragraph 1, above. Tr. 187.
4. Approximately 10% to 15% of the shells collected by Photo Recycling in the United States in 2004 were obtained from independent photo processors or small, wholesale photo finishing labs. Tr. 187.
5. According to Mr. Silvera, based on his knowledge of the industry, 85% of disposable cameras developed at photo processing locations are likely purchased from that same location. Tr. 316–17.
6. The remaining 10% to 12% of the shells collected by Photo Recycling in the United States in 2004 were obtained from shell collectors. Tr. 187.
7. Photo Recycling contracts to buy from the third type of vendor, *i.e.*, shell collectors, only shells with original Kodak, Fuji, Konica or Concord packaging identifying the manufacturer. Tr. 192, 341.
8. Photo Recycling requires that shipments it purchases from shell collectors be accompanied with letter certifications indicating that the shells in the cartons were collected from photo processors in the United States. Tr. 303–04, 354–55.
9. Photo Recycling collects in excess of one million shells per month from approximately 5,000 different vendors. Tr. 314, 321.
10. Photo Recycling sells and ships at least 90% of all the shells it collects to Polytech in China. Tr. 193, 218.
11. Between the summer of 2001 and the winter of 2003, Photo Recycling sorted all the shells it collected. Tr. 319, 326. Photo Recycling did not sort for tourist shells until the latter stages of this sorting program. Tr. 326. Tourist shells, with clearly identifying foreign markings and foreign language, comprised "way less than 1%" of the total shells collected during that time. Tr. 323. This percentage is based on Photo Recycling's sorting experience gained from the sorting of "probably in excess of 10 million shells." Tr. 323.
12. Photo Recycling no longer performs complete sorts of the shells it collects. Instead, Photo Recycling performs sample sorts of approximately 5% of the total shells it receives from all its vendors. Tr. 301–02, 320.
13. Photo Recycling's sample sorting system focuses primarily on identifying shells that came from disposable cameras first sold in the United States by sorting for shells with original label-

ing and those with foreign markings. Tr. 326–28. During sample sorts, shipments from collectors are, on rare occasion, completely sorted. Tr. 329. A complete sort of a shipment occurs only when a variance involving previously reloaded or foreign-labeled shells is detected. Tr. 301–02, 329, 357.

14. In Mr. Silvera's opinion, if there were an inordinately high number of tourist shells in the mix of shells sent to Polytech, Polytech would report that to Photo Recycling as being some aberration, which Polytech and Photo Recycling then would discuss. Photo Recycling has not had that reporting from Polytech. Tr. 323–24.
15. In Mr. Silvera's opinion, payments received by Photo Recycling from Polytech and the reports generated by Polytech indicate that Photo Recycling does not sell Polytech a significant number of tourist shells. Tr. 332.
16. Photo Recycling's sample sorting system also screens for shells with black tape and other signs indicating shells that previously were reloaded. Tr. 328. Photo Recycling depends upon reports from Polytech to ensure that a shipment of Photo Recycling shells does not contain a high percentage of reloaded shells. Tr. 357.
17. Photo Recycling also collects shells from countries other than the United States, but these shells are shipped directly to Hong Kong from those countries instead of being shipped to Photo Recycling in New Jersey. Tr. 308.
18. In Mr. Silvera's opinion, a "very tiny" number or *de minimis* amount of tourist shells that were first sold in English-speaking countries, such as Ireland, Australia or the United Kingdom, could possibly have been among the shells Photo Recycling collected in 2004 from photo processors in the United States. Tr. 308, 317–18.
19. In Mr. Silvera's opinion, a "very tiny" number or *de minimis* amount of tourist shells with foreign-language wrappers or bilingual wrappers could possibly have been among the shells Photo Recycling collected in 2004 from photo processors in the United States. Tr. 316–19.

2. Findings of Fact Established by the Testimony of Mr. Michal Zawodny

During trial, Jazz also introduced the testimony of its quality manager, Mr. Michal Zawodny, who oversees the production quality of all Jazz disposable cameras and is responsible for overseeing the procedures that the Polytech factory in China uses to produce Jazz cameras. The court found his testimony credible, based on his demeanor, his demonstrated knowledge of Polytech's sorting and processing operations, and the precision with which he responded dur-

ing direct testimony and cross-examination. His testimony, some of which was aided by viewing the footage of two videotapes filmed in 2003 of Polytech's facility, and admitted into evidence, established, by a preponderance of the evidence, the following facts.

20. The Polytech facility occupies several floors in an industrial building in Shenzhen City. Shells sent to the Polytech facility are stored, sorted, refurbished and packaged on different floors. Tr. 395.
21. The sorting operation begins with Polytech sorters "dumping" shells from individual shipping boxes, previously part of a larger container, onto the sorting line. Tr. 399. Sorters then select shells for the production of Jazz cameras intended for sale in the United States. Tr. 400–01.
22. Polytech employs between 30 and 40 sorters, and the facility sorts approximately 130,000 to 150,000 shells per day or day and a half. Tr. 411–12, 588–90.
23. Shipments of shells usually contain 50% to 60% Kodak brand shells, approximately 20% Fuji brand shells, 5% to 10% Konica brand shells and a relatively small percentage of Concord brand shells. Tr. 586–87.
24. Only Kodak, Fuji, Konica and Concord brand shells are chosen for production for the United States. Tr. 399–400.
25. Within the group of acceptable brands, Polytech sorters choose only shells with original wrapping or labeling produced by Kodak, Fuji, Konica and Concord, and they screen for any shells with foreign characters (*i.e.*, Japanese or Arabic). Tr. 406, 410–11, 585–90. Sorters will not choose shells with foreign characters for United States production. Tr. 588–59.
26. Questionable shells, such as shells with English lettering not typical of the United States market, are further reviewed by other Polytech staff; shells not chosen for production for the United States are sent back to the storage area and labeled as "inactive for U.S. production." Tr. 400–01, 406, 587–88, 590. Shells neither selected for production nor set aside as "inactive" are placed on the sorting line a second time. Tr. 589.
27. Although Polytech's sorters do not, for the most part, speak English, they select shells for processing by comparing the shell packaging to the packaging on sample packages. Tr. 590.
28. In Mr. Zawodny's opinion, it may not be possible to screen out all foreign (*i.e.*, English language shells that may have been sold abroad, *e.g.*, in England) or foreign language shells (*i.e.*, shells labeled in French and English that were probably sold in Canada). Tr. 588, 590. The sorting system is based on a "certain process and certain standards." Tr. 598. In Mr. Zawodny's opinion, the sorting system is "quite accurate" and "works well." Tr. 598.

29. Polytech's sorting procedure requires that each shipment is sorted separately, so that shipments collected from foreign sources are removed from the sorting line and sorting area. Tr. 398–99.
30. Polytech sorters also screen for shells with black tape or shells that contain replacement parts. Tr. 551–52.
31. In 2004, Jazz purchased one shipment of shells from Seven Buck's Inc., in Newport Beach, California. Jazz purchased from Seven Buck's only shells with original wrappers. Mr. Zawodny witnessed the sorting of this shipment in the greater Los Angeles area, and "reviewed" the products that were made available by Seven Buck's for purchase by Jazz. Tr. 556–57; Pl.'s Ex. 19.
32. Seven Buck's workers "separated" shells in accordance with the samples provided by Mr. Zawodny and using the same standards employed by sorters at Polytech. Seven Buck's employees prepared the container for shipment to Polytech. Tr. 556–57.

The court finds, based on the testimony of Mr. Zawodny, corroborated by documentary evidence, including reports of sorting, that Polytech, during the time at which the LFFPs at issue were processed, employed a sorting system adequate to identify and exclude from processing shells that previously were reloaded, and adequate in the context of the information commercially available, to identify and exclude from processing any shells of cameras, if present, that entered the United States under the personal use exception in the Exclusion Order.

B. Findings of Fact Relevant to the Issue of Permissible Repair

Mr. Zawodny's testimony, some of which, as noted above, was aided by viewing the footage of two videotapes filmed in 2003 of Polytech's facility, established, by a preponderance of the evidence, the following facts.

33. Mr. Zawodny spent February, March, April, June, August, and September of 2004 in China overseeing the Polytech facility's processes of sorting shells and producing Jazz disposable cameras. Tr. 393–94.
34. Boxes containing sorted shells to be repaired for the United States market are moved to production areas of the Polytech facility. Tr. 412–14. Mr. Zawodny characterized this procedure as the first step of the repair process. Tr. 415.
35. Each shipment of shells is processed one at a time on the production lines. Tr. 415.
36. Polytech operates three production lines for daylight camera loading operations and one production line for dark loading operation (for Fuji and Konica type shells) at Polytech. Tr. 513, 540.

37. The removal of original wrapping and packaging from the shells is the next step of the process. Tr. 415.
38. Operators stationed at production lines perform different procedures, including opening the shells, replacing advance wheels to fit the new film, removing dust and debris from the interior, replacing batteries in flash cameras, loading the film, checking the charge of the flash and resetting the counter. Tr. 514–18.
39. Operators close the camera with the original back covers produced by Kodak, Fuji, Konica or Concord and attach an additional molded part to cover the portion of the camera where the film is placed. Tr. 515–16.
40. "Full back replacement" is a term used to describe a reloaded camera with a completely new full back cover. Tr. 607. Shells that were repaired with full back replacements are easily identifiable by inspecting the exterior of the back cover and are not used for production of Jazz cameras intended for sale in the United States. Tr. 607, 611. The "full back replacement" testimony refers to refurbishing of Kodak shells. Tr. 611.
41. Black light-tight tape is used to seal any gaps between the seams. Tr. 516.
42. Jazz cameras are screened at quality control stations to ensure that the flash and trigger function properly and are ultimately packaged with new, Jazz wrappers. Tr. 517–18, 537, 553–54.

The exhibits admitted into evidence establish that the subject LFFPs were refurbished in late July 2004. Mr. Zawodny's testimony was aided by viewing the videotapes admitted into evidence as Segments 1 and 2 of Plaintiff's Exhibit 18. Mr. Zawodny's testimony showed that the videotapes were filmed in 2003. The court finds, based on Mr. Zawodny's testimony, that the processes shown in the videotapes do not differ in a way material to the permissible repair issue, from Mr. Zawodny's description of the processes used to refurbish the subject merchandise.

The court further finds, based on Mr. Zawodny's testimony, that the processing undertaken by Polytech at the time the subject merchandise was refurbished were opening of the body of the shell, replacement of the advance wheel, replacement of the film and of the battery (if a flash camera), resetting the counter, closing and repairing the case using original parts except for the additional molded part referred to above, repackaging the refurbished camera, and various minor operations incidental to these processes. The court further finds, based on his testimony, that the aforementioned processing did not employ full-width back replacements in reloading Kodak or other shells.

C. Findings of Facts Relevant to Jazz's Inventory Control Program

1. Findings of Fact Established by the Testimony of Mr. Leon Silvera

Mr. Silvera's testimony established, by a preponderance of the evidence, the following facts.

43. Photo Recycling ships shells to Polytech via ocean freight, Tr. 252, and prepares summary information documents for each shipment, which include the vessel name, the date that the shipment sailed, where the shipment is consigned to, the quantity of cartons and shells and the total weight of shells. Tr. 225; Pl.'s Exs. 1–14 (encompassing both parts A and B).
44. Photo Recycling assigns a unique master lot number ("MLN") to every shipment sent to Polytech to identify each shipment. Tr. 251–52, 330, 381.
45. A collector shipment receives a separate MLN only when the quantity of shells received is sufficient to fill an entire container. Tr. 358. When the quantity received is not sufficient to fill a container, then identification marks are placed on each carton of collector shells within the container, which Polytech uses to segregate collector shells for sorting purposes. Tr. 358.

The court finds, based on the testimony concerning inventory control and the documentary evidence, that the shells provided to Polytech from Photo Recycling were maintained under the Master Lot Number inventory control system.

2. Findings of Fact Established by the Testimony of Mr. Michal Zawodny

Mr. Zawodny's testimony established, by a preponderance of the evidence, the following facts.

46. MLNs are generated by Jazz in New Jersey and relayed to Photo Recycling in New Jersey. Tr. 396–97, 459, 583–84.
47. MLNs are used to trace shells through the sorting and production processes. Tr. 459, 548–49. They appear on most shipping documents used to transport shells from location to location. Tr. 459. All shells belonging to one MLN are stored in one location. Tr. 398.
48. Shells selected for United States consumption by Polytech sorters are stored in large cardboard containers indicating the quantity of shells and marked with the corresponding MLN. Tr. 400.
49. Polytech's sorting procedure requires that each MLN be sorted separately, so that MLNs collected from foreign sources are removed from the sorting line and sorting area. Tr. 398–99.
50. Polytech's production procedure requires that shells in each MLN are processed on production lines one at a time. Tr. 415.

51. Ink dots are placed on the back of each Jazz camera produced for the United States and finished cameras are placed in boxes. The boxes are placed on pallets that are marked with quantity, MLN, type of film used to reload, and the date the cameras were repaired. Tr. 537, 542, 554.

The court finds, based on the testimony concerning inventory control and the documentary evidence, that the operations of Polytech involving the subject merchandise were conducted according to plaintiff's inventory control system using Master Lot Numbers.

V. Conclusions of Law on Permissible Repair and First Sale

Plaintiff established, by a preponderance of the evidence, that the LFFPs in the two shipments at issue in this case that were refurbished from shells provided by Photo Recycling satisfied both the permissible repair and first sale requirements. Plaintiff did not meet its burden of proof to establish that the LFFPs refurbished from Seven Buck's shells satisfy the first sale requirement.

A. Plaintiff Has Established by a Preponderance of the Evidence that the Subject Merchandise Underwent Permissible Repair

Plaintiff offered unrebutted testimonial and videotape evidence from which the court concludes that the process used at the Polytech facility at the time the subject merchandise was refurbished was in accordance with the permissible repair standard set forth by the Court of Appeals for the Federal Circuit. *See Jazz Photo Corp. v. Int'l Trade Comm'n*, 264 F.3d at 1106–07.[5] Defendant attacked only the probative value of the evidence offered by plaintiff on permissible repair. A principal argument of defendant was that the videotapes admitted into evidence were made before the time at which the LFFPs at issue were refurbished.[6] However, Mr. Zawodny testified from personal knowledge, gained through observation, of the changes made in the processing operations at the Polytech plant since the videotapes were made. None of those changes establishes an impermissible repair process, and instead they relate to matters other than the physical repair processes performed on the LFFPs.

The government also argued that the videotapes do not depict the repair process for every kind of camera Jazz imported. However, Mr. Zawodny's testimony, based on his personal knowledge stemming from his position with Jazz, presented unrebutted evidence allowing

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[5] This evidence is consistent with the findings of the District Court for New Jersey and, with respect to Kodak shells, of the International Trade Commission's administrative law judge that the Polytech facility operates in conformity with the permissible repair doctrine. *See Fuji Photo Film Co. Ltd. v. Jazz Photo Corp.*, 249 F. Supp. 2d at 445–47; *ITC Enforcement Initial Determination* at 91–92.

[6] The documentation submitted by plaintiff and admitted into evidence shows that these cameras were refurbished in or around late July of this year. *See* Pl.'s Exs. 17, 20.

the court to conclude that the repair process was permissible regardless of differences in camera make or model.

The court finds the testimony of Mr. Zawodny credible, based on his demeanor, his demonstrated knowledge of Polytech's processes and the precision with which he gave his responses to questioning. His testimony was bolstered by his explanation of the processes demonstrated on the videotapes. Based on this evidence, and the evidence concerning inventory control, as discussed elsewhere in this opinion, the court finds by a preponderance of the evidence that all of the cameras in the two shipments at bar were refurbished by a process at Polytech that constituted permissible repair, as established by the Court of Appeals in *Jazz Photo Corp. v. Int'l Trade Comm'n*, 264 F.3d at 1106–07.

B. Plaintiff Has Satisfied a Requirement of "First Sale" by Establishing by a Preponderance of the Evidence that All of the Subject Cameras Were Repaired Using Shells Collected from Photo Processors Located in the United States, Except for Cameras Repaired from Shells Purchased from Seven Buck's

Plaintiff has presented sufficient, unrebutted evidence to establish that the shells collected by Photo Recycling and subsequently used by Polytech in producing LFFPs at issue in this case were collected from photo processors in the United States. Mr. Silvera's testimony established that the shells Photo Recycling collected in the United States were purchased from photo processors in the United States or from independent collectors who certified that they provided Photo Recycling with shells only from United States photo processors.[7] No evidence of record rebuts or otherwise casts doubt on Mr. Silvera's testimony or the documentary evidence supporting it. Plaintiff established, through testimony of its witnesses at trial and documents pertaining to inventory control, the necessary identification between the shells collected, directly or indirectly, from photo processors and the finished LFFPs in the two subject shipments.

It is undisputed that the two subject entries contain some LFFPs repaired from shells obtained from a source other than Photo Recycling and that this other source of shells was Seven Buck's, Inc.[8] The evidence shows that Jazz bought these shells directly from Seven Buck's and sent them from California to Polytech in China. Jazz did not offer any evidence that the terms of the contract with Seven Buck's required that Seven Buck's provide only shells collected in

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[7] Mr. Silvera also testified, based on his knowledge of the industry, that 85% of shells are processed at the same store where the original camera was purchased. He offered no documentary evidence to support this statement.

[8] Plaintiff's records, as admitted into evidence, indicate that the LFFPs resulting from Seven Buck's shells comprise a significant portion of the two entries. Determining the exact quantity will require the segregation of the merchandise, a subject discussed *infra*.

the United States. Nor is there any evidence that the Seven Buck's shells were collected, directly or indirectly, from U.S. photo processors. Unlike the independent shell collectors with whom Photo Recycling contracted, Seven Buck's did not provide Jazz any certification that they collected the shells solely in the United States or from U.S. photo processors.

Jazz contends that the Seven Buck's shells underwent two sorting operations to remove foreign shells, one done under Mr. Zawodny's observation in California, prior to shipment of the shells to China, the other performed in China under Polytech's standard procedures. Jazz asks the court to conclude that the double sorting is as reliable, if not more reliable, a measure of first sale than collection from a photo processor in the United States. The court is unable to reach such a conclusion on the evidence presented.

As discussed previously, any sorting process Jazz is able to conduct to exclude foreign-sold shells is subject to inherent limitations that permit a camera with a wrapper printed in English but first sold in a country other than the United States to remain in the chain of production. Plaintiff did not introduce evidence establishing that English-label disposable cameras are not sold in foreign countries. Although there was testimony that the Polytech sorting process was capable of detecting and removing from production shells of a type not typically sold in the U.S. market, no evidence was introduced to establish that English-labeled cameras that *are* typical of the U.S. market are not also sold abroad, in English-speaking countries or elsewhere. There is no evidence that any such cameras would necessarily be identified as "inactive for U.S. production" by Polytech.

The findings of fact the court has made concerning sorting of shells have significant implications for the cameras made from the shells provided to Polytech by Photo Recycling and, in contrast, for the cameras made from the shells provided to Polytech by Jazz after purchase from Seven Buck's. For the Photo Recycling shells, which have been shown to have been collected from U.S. photo processors, the court's findings of fact, and reasonable inferences drawn from those findings of fact, support the conclusion that the only shells included in the mix that resulted from cameras that did not undergo first sale in the United States would have been previously reloaded shells and tourist shells. This conclusion stems in part from the presumption of regularity arising from the enforcement by Customs of the Exclusion Order, under which commercial importation of LFFPs infringing Fuji's patents is prohibited.

As discussed previously, the evidence establishes that Polytech sorted to exclude from production those shells displaying indications of previous reloading. Such shells, according to the testimony of Mr. Zawodny, are identifiable by the presence of the black tape, by the presence of replacement parts, or by the absence of an original label.

The remaining possibility is the presence of tourist shells. As noted previously, there is no evidence of record that the subject shipments included any cameras refurbished from tourist shells. The only evidence of record pertaining to the likelihood of the presence of tourist shells among shells collected from U.S. photo processors is that they would exist at a percentage of much less than one percent. The sorting employed by Polytech, though inherently less than foolproof, is sufficient, on the facts of this case, to establish that Jazz has met its burden of establishing first sale for the cameras refurbished from shells collected from photo processors in the United States. Regarding the remaining cameras, *i.e.*, those refurbished from Seven Buck's shells, there has been no showing that shells from LFFPs first sold abroad will be confined to reloaded shells and tourist shells. There is no evidence from which the court may draw an inference that shells from cameras first sold abroad would be rare or nonexistent among the shells bought from Seven Buck's. The evidence that two sorting operations were performed on these shells is insufficient because, as discussed above, sorting has inherent limitations.

The court cannot ignore the limitations in the sorting process where the sorting operation is relied upon not only to remove any tourist shells present, but also to remove *all* shells from cameras first sold abroad, including those shells sold in the U.S. market, or imported from abroad, for which no connection is established to a U.S. photo processor. Two, or even more, sorting operations are not sufficient to overcome this lack of proof concerning the location of sale of the camera when it was new. For these reasons, plaintiff has not met its burden of establishing, by the preponderance of the evidence, that the LFFPs refurbished from Seven Buck's shells satisfy the requirement of patent-exhausting first sale in the United States.

C. Plaintiff Has Satisfied a Requirement of "First Sale" by Establishing by a Preponderance of the Evidence that, at the Time the Cameras Were Repaired, a System Was in Place to Identify and Remove Shells from Previously Reloaded Cameras

Mr. Zawodny presented unrebutted testimony that the Polytech facility sorts and excludes from processing shells in a condition indicating previous reloading. As noted *supra*, the so-called "reloaded reloads" were the primary source of infringing cameras according to the ITC administrative law judge. *See ITC Enforcement Initial Determination* at 65. Jazz established, by a preponderance of the evidence, that previously reloaded shells are recognizable by physical characteristics, such as the lack of an original wrapper, the presence of black tape on the repaired camera shell, or the presence of replacement parts. On the subject of replacement parts, Mr. Zawodny testified that a full-width replacement back used to repair a Kodak

LFFP appears physically different from the original, and that Polytech's sorting system would exclude such shells from the reloading process.

From all the evidence plaintiff presented on the sorting process employed by Polytech, together with the evidence on inventory control, discussed elsewhere in this opinion, the court concludes that plaintiff has met its burden of establishing that the LFFPs at issue were not refurbished from previously reloaded shells.

D. Plaintiff Has Satisfied a Requirement of "First Sale" by Establishing by a Preponderance of the Evidence that, at the Time the Cameras Were Repaired, a System Was in Place to Identify and Remove, Based on Non-Proprietary Information, Shells of Cameras Indicating First Sale Outside the United States

Plaintiff established by a preponderance of the evidence that Polytech had a sorting system in place at the time the subject cameras were processed. That evidence showed that the shells, during the sorting process, are checked for several criteria including make, model, whether they were previously reloaded, whether they have any foreign language or markings indicating they were first sold in a country other than the United States, whether they are of a type not typical for the U.S. market, and whether they are in good enough condition to be repaired. Particularly relevant to the issue of tourist shells was Mr. Zawodny's testimony that the shells are sorted at the Polytech facility to accept for reloading only those shells that are of specific models and that do not have foreign language on the package. This sorting process is part of the same process whereby reloaded shells, defective shells, and shells without an original wrapper are removed from those shells designated for repair.

The language of the original wrapper is an indication of the country in which the shell was intended to be sold, according to the *ITC Enforcement Initial Determination. ITC Enforcement Initial Determination* at 35. Defendant has not established that there is any other publicly-available information upon which a company repairing LFFP shells could rely to remove shells first sold in a market other than the United States.

By establishing collection of the shells from U.S. photo processors, and by presenting evidence of sorting to exclude from processing, according to information available to Jazz, tourist shells that may have been present, Jazz established by a preponderance of the evidence that the LFFPs in the subject shipments that were repaired using shells other than the Seven Buck's shells satisfy the requirement of patent-exhausting first sale.

It appears that sorting for shells of foreign-sold cameras by examining the packaging for foreign language may be an over- and under-inclusive sorting process. It may be over-inclusive, in that this court has no evidence before it foreclosing the possibility that bilingually

or multi-lingually labeled LFFPs, or LFFPs not labeled in English, are sold in some places in the United States. Similarly, it may be under-inclusive, because this court has no evidence showing that English-labeled LFFPs may be sold in English-speaking countries other than the United States. Due to the inherent limitations in the sorting process, the court is unable to conclude, under the facts and circumstances presented by this case, that first sale may be established by evidence of sorting that is not accompanied by evidence that the shells were collected from photo processors in the United States.

E. Plaintiff Met Requirements of "First Sale" and "Permissible Repair" by Establishing by a Preponderance of the Evidence that it Had, at the Time the Cameras Were Repaired, an Inventory Control System to Track the Shells it Designated for Use in Repairing Cameras Destined for the United States

Plaintiff has established with unrebutted testimonial, video and documentary evidence that during the time the subject merchandise was refurbished, and during the time the shells used for that process were acquired, it had a system in place based on "Master Lot Numbers" ("MLNs") that tracked a group of shells purchased by Photo Recycling or Jazz from point of shell purchase to LFFP reimportation into the United States. The evidence showed that MLNs are assigned by Jazz, and Photo Recycling and Polytech coordinate their activities with Jazz to maintain the MLN system throughout the entire process. Mr. Zawodny testified that boxes containing MLNs are sorted and processed one at a time to prevent commingling of one MLN with another and that at the conclusion of the repair process in China, the LFFPs are packed into cartons for shipment to the United States. The documents submitted by Jazz, and admitted into evidence, corroborate Mr. Zawodny's testimony concerning the tracking of merchandise by MLN.

An adequate inventory control system is required so that "first sale" and "permissible repair" can be established for the particular cameras in the two shipments. The court concludes, based on findings of fact, that plaintiff has satisfied this inventory control requirement.

VI. Segregation of the Cameras Refurbished Using Seven Buck's Shells

At a status conference held on November 1, 2004, the court informed the parties of its tentative findings of fact and conclusions of law concerning the first sale and permissible repair issues. Those tentative findings of fact and conclusions of law are set forth in this opinion as adopted findings of fact and conclusions of law, as are additional findings of fact and conclusions of law that are needed to re-

solve the issues for which additional proceedings were necessary after November 1, 2004. One of those issues in dispute between the parties, and requiring additional proceedings, was the issue of segregation of the merchandise. The court had raised, during plaintiff's closing argument on October 18, 2004, the question whether cameras made from Seven Buck's shells could be segregated. The issue had not been factually resolved by the close of trial.

The court reopened the trial record for the purpose of allowing the parties to introduce evidence on the segregation issue. Plaintiff produced three one-page "Inspection Reports," each of which were presented with multi-page attachments presenting tables of numbers, which plaintiff offered for the purpose of demonstrating correspondence between various MLNs, including MLN 463 that was assigned to the Seven Buck's shells, and the numbers on the individual cartons (each containing sets of cameras) in the two shipments. Defendant at first objected to the admission of the document into evidence on grounds of authentication and hearsay and also questioned whether the document, even if it were to be ruled admissible, reliably could be used to establish segregation of the merchandise.

To determine the issue of whether the tables attached to the three Inspection Reports corresponded to the labeling of the cartons in the two shipments so as to allow segregation, the court, pursuant to authority granted by 28 U.S.C. § 2643(b), entered, on November 5, 2004, an Order for an Expedited Administrative Determination. The Order directed, *inter alia*, that Customs conduct a physical examination of the merchandise and its packaging and report to the court whether the documentation offered by plaintiff in support of segregation, when compared to marks and labels present on the packaging, provided a means to identify the cameras related to MLN 463. The Order directed that representatives of plaintiff be allowed to be present for the examination, to participate in the administrative proceeding, and to submit its own report of the examination. It also allowed counsel for both parties to be present and to participate in the administrative proceeding.

Both parties submitted, on November 8, 2004, reports on the administrative proceeding and the examination. The reports are in agreement that all of one entry and a portion (approximately 60 percent, according to plaintiff) of the other entry were examined using the documentation provided by plaintiff. They also agree that the examination was sufficient to allow complete and accurate reporting in response to the court's inquiries and, in defendant's words, "to draw clear conclusions about whether merchandise from Master Lot Number 463 can be identified." *Def.'s Resp. Pursuant to Order for Expedited Administrative Determination* at 2. Plaintiff reported, *inter alia*, that its representatives "reported that they were able to conduct the segregation precisely, using the Inspection Reports provided

by plaintiff." *Pl.'s Interim Report Concerning Segregation & Mot. For Order Directing Completion of Segregation & Release of Segregated Merchandise* at 2.

The Customs report is far from a model of clarity. As a threshold observation, some of the lack of clarity in the report appears to be the result of painstaking effort to preserve defendant's then pending objection to the admissibility of the documentation plaintiff offered on the issue of segregation (which objection defendant later waived by stipulating to the admissibility of that documentation). Taking such pains in the report was unnecessary because the Order expressly noted the admissibility objection and viewed it as premature "in view of the administrative proceeding," and because the Order indicates that the documentation was to be relied upon for purposes of the examination.

The Customs report also appears to take great pains to emphasize the observation by Customs, not disputed by plaintiff, that the individual cartons in the two shipments are not labeled according to Master Lot Number. This observation is also irrelevant to the information sought by the Order. Were the cartons labeled with MLNs, the documentation plaintiff submitted would be unnecessary for segregation on a carton-by-carton basis. As the Order indicated, the examination of the cartons together with the documentation was needed to determine "whether the information in that document, together with any other information plaintiff may submit or communicate to Customs in the proceeding ordered herein, corresponds to labels, markings or other information in or on the LFFPs, boxes, cartons, or other packaging so as to indicate a relationship between Master Lot Number 463 and specific LFFPs or packages of LFFPs." *Order for Expedited Administrative Determination* at 3. Nevertheless, the Customs report contains the statement that "Customs has no independent means of identifying which of the LFFPs in the subject shipment are related to Master Lot Number 463." *Def.'s Resp. Pursuant to Order for Expedited Administrative Determination* at 2. "In Customs' view, the markings on the cartons that were examined do not establish which LFFPs are related to Master Lot Number 463. Accordingly, in the absence of a finding by the Court that the aforementioned documents submitted by plaintiff are wholly authentic and reliable, these LFFPs cannot be accurately identified and segregated from the balance of the merchandise." *Id.*

Despite the above-quoted language, the court interprets the Customs report, read in its entirety, to be in agreement with the report of plaintiff that the documentation submitted by plaintiff enables identification and segregation of the cartons in the two shipments that are associated with MLN 463. Certain statements in the Customs report cause the court to find there is no disagreement between the parties that the documentation allowed identification of the individual cartons containing the cameras of MLN 463. For example, the

Customs report states as follows: "We note that Import Specialist Dan Johnson has indicated which cartons, allegedly associated with Master Lot Number 463, were actually examined by placing check marks and his initials next to the line corresponding to those cartons on the attached copy of plaintiff's submission (as discussed in more detail below)." *Def.'s Resp. Pursuant to Order for Expedited Administrative Determination* at 2 (footnote omitted). The checkmarks appear on the copy beside each line reference to MLN 463 listed in the handwritten tables.

After taking the deposition of a witness in Hong Kong whose availability for a video conference Jazz arranged, defendant stipulated to the admissibility of the Inspection Reports and attachments as business records of Jazz. Those documents are ordered to be admitted to the record in these proceedings as Plaintiff's Exhibit 23. At the motion of plaintiff, consented to by defendant, the court also admits the deposition transcript into evidence as Plaintiff's Exhibit 24.

A. Findings of Fact on the Segregation Issue

The court adopts a finding of fact, based on unrebutted evidence, that plaintiff's Master Lot Number system of inventory control, addressed previously, assigned a single MLN (MLN 463) to the shells Jazz purchased from Seven Buck's and the reloaded cameras that Polytech produced from these shells. MLN 463 is associated with the Seven Buck's shells and resulting cameras by various business records produced by plaintiff. *See* Pl.'s Ex. 19.

Based on all the evidence presented on the segregation issue, including in particular the Inspection Reports and the handwritten tables attached to them, and also including the report of Customs made in the administrative proceeding, the court reaches the finding of fact that the Inspection Reports (including their attached handwritten tables) allow segregation of the specific cartons in the two shipments that contain the cameras of MLN 463.

Based on the handwritten tables attached to the Inspection Reports, the court adopts the finding of fact that the shipment contains inner cartons in which cameras from MLN 463 are commingled with cameras from other of plaintiff's Master Lot Numbers. The cartons in which this commingling occurred are identified on the handwritten tables.

B. Conclusions of Law on the Segregation Issue

Plaintiff's burden of proof of showing both first sale and permissible repair by a preponderance of the evidence applies to each camera in the two shipments. Accordingly, plaintiff is required to establish that the cameras refurbished from Seven Buck's shells are segregable, on a direct identification basis, from the remaining cameras. Plaintiff has met, by a preponderance of the evidence, its bur-

den of proof as to this segregation, with the exception of the several cartons in which cameras made from shells purchased from Seven Buck's were commingled with other cameras in the shipment.

Defendant pointed out, and the court agreed, that the handwritten Inspection Report tables show that some cartons contain LFFPs from MLN 463 and also contain cameras from other MLNs. Plaintiff does not dispute this point and has not offered any evidence upon which those commingled cameras may be sorted. Accordingly, the plaintiff has not met its burden of proof establishing segregation of those particular cartons. The court concludes that the cameras in cartons shown by the handwritten tables to contain cameras from MLN 463 and to also contain cameras from other MLNs do not satisfy the first sale requirement and are determined by the court, by application of the Exclusion Order, to be excluded from entry.

VII. Application of USCIT R. 62(a)

Rule 62(a) of this court provides that "[e]xcept as stated herein or as otherwise ordered by the court, no execution shall issue upon a judgment nor shall proceedings be taken for enforcement until the expiration of 30 days after its entry." Plaintiff urges this court to order the release of the merchandise on the day judgment is entered, through an immediately enforceable judgment order, and hence is urging this court not to allow any automatic stay pursuant to USCIT R. 62(a). Its argument is that Jazz needs immediate release of the merchandise because of its precarious financial status and that the government would not be injured by the loss of its opportunity to seek a stay preventing the release of the merchandise pending appeal. The United States objects to any shortening of the 30-day period.

After considering the arguments of the parties on this point and the evidence of record, the court has decided to shorten the automatic stay period to 10 days. The court believes this result balances the interests of, and in particular the likelihood of harm to, both parties. The court notes, moreover, that the 10-day automatic stay period it is determining to be appropriate for this case conforms with the automatic stay period in effect for the district courts under the analogous Rule 62(a) of the Federal Rules of Civil Procedure.

The court has conducted the proceedings in this case on an expedited basis, with the consent of both parties. Approximately two weeks elapsed from filing of the summons and complaint on October 4, 2004 to the last day of trial (October 19, 2004). The court informed the parties of its tentative findings of fact and tentative conclusions of law on two issues in the case–first sale and permissible repair–on November 1, 2004, after which time additional proceedings were necessary, as discussed above, on the issue of segregability of the merchandise. The administrative proceeding addressed to the segregation issue produced reports to the court that were filed on Novem-

ber 8, 2004. A 30-day automatic stay period would be two-thirds as long as the time consumed from filing of the case to entry of judgment.

The considerations leading to the expedited trial schedule were understood by both parties. They include the bankruptcy proceeding involving Jazz, in which Fuji is the primary creditor. The public record of those proceedings disclose that a motion is pending to convert the bankruptcy proceedings from reorganization under chapter 11, to liquidation under chapter 7, of Title 11, United States Code. Another consideration relevant to the need for expedited trial, which consideration had been apparent to the court and the defendant from the pleadings Jazz filed on the record in Court No. 04–00442, brought in this court under a claim of jurisdiction under 28 U.S.C. § 1581(i), was that Customs had detained a number of shipments of Jazz's merchandise other than the two shipments involved in this case.

The 30-day stay provided for under Rule 62(a) applies only if the court takes no action to shorten this time period. Rule 62(a) was amended in 1986 to allow the court, in its discretion, to make an exception to the automatic 30-day stay. A consideration underlying the change in the rule apparently was the problem posed by perishable merchandise or by other situations in which time is of the essence. *See* Practice Comment to USCIT R. 62.

Although USCIT R. 62(a) clearly grants the court discretion to shorten the 30-day period, there is scant case law providing guidance on the standard to apply in deciding whether, and by how much, to shorten the automatic stay period. More common are those motions seeking, under Rule 62(d), a stay pending appeal longer than the 30 days provided under Rule 62(a). The court considers the shortening of a stay to involve the same considerations as do the extending of a stay. In *American Grape Growers Alliance v. United States*, 9 CIT 505, 507 (1985), the Court stated that "[t]he crux of the matter, as it should be, is the question of whether the stay will *avoid* an injury or *cause* an injury." (emphasis in original). The criteria the court applies to grant a stay are four fold: (1) likelihood of success of the party seeking relief; (2) whether plaintiff will suffer irreparable harm; (3) the balance of harm to the parties involved; and (4) any public interest that should be served. *Id.* The first factor has been met in part, as Jazz has established the admissibility of some of its merchandise.

A. Findings of Fact on the Rule 62(a) Issue

The court makes a finding on which it is basing its decision to shorten the Rule 62(a) period for an automatic stay. This finding is independent of any consideration of Jazz's financial status. Specifically, the court finds that the subject merchandise is likely to be significantly less valuable to Jazz if it is released too late for Jazz to

have a meaningful chance of selling it during the current holiday selling season. The court takes judicial notice of the importance of the holiday selling season to retailers, including Jazz's customers.[9] Moreover, factual evidence recently admitted to the record upon defendant's motion, as discussed *infra*, establishes that Jazz has an immediate need to fill current orders. Allowing the ordinary stay of 30 days would mean that Jazz would be unable to enforce the judgment entered by the court until December 18, 2004. By that time, and allowing for the time needed to get the merchandise into retail channels, practically all of the holiday selling season will have passed. The court believes that the consideration concerning the holiday selling season and Jazz's need to fill current orders, by itself, is sufficient in the context of this case to support a decision to shorten the stay period. While the merchandise is not "perishable," it is in an analogous state, its commercial importance to the plaintiff dependent significantly on its availability for sale in the very near future. The court also notes that Congress viewed cases involving the exclusion of merchandise as deserving of expedited adjudication and judicial review. *See* 19 U.S.C. § 1499(c).

B. Absence of Factual Record Sufficient to Eliminate 10-Day Automatic Stay Period

The court may take notice from the public record in the bankruptcy proceeding that Fuji, a creditor participating in those proceedings, is seeking to effect the conversion of the proceedings from reorganization of Jazz under chapter 11, to liquidation of Jazz under chapter 7, of the Bankruptcy Code. Fuji filed the motion to convert on August 2 of this year. The Bankruptcy Court is currently scheduled to consider that motion on January 28, 2005, though it may consider it earlier if events require.[10]

At a status conference, the court offered defendant the opportunity to move to place on the record evidence relevant to Jazz's financial status as it relates to the issue of whether, and how long, there should be an automatic stay of judgment. On November 12, 2004, defendant moved to supplement the record with a transcript of deposition testimony of Jazz's controller. The court has granted defendant's motion. The deposition testimony establishes that Customs released to Jazz ten containers of LFFPs with a value estimated at "close to $2 million." This fact, which plaintiff does not contest, corroborates

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[9] Jazz repeatedly has emphasized the importance of the holiday selling season to its business, *e.g.*, in pleadings in the related Court No. 04–00442. *See Pl.'s Mot. for Entry of a Temporary Inj.* at 3 (Sept. 16, 2004).

[10] On November 17, 2004, defendant filed a motion to leave to file a status report. That status report stated that a hearing to consider Fuji's motion to convert previously scheduled for November 19, 2004 had been changed to January 28, 2005. The court hereby grants defendant's motion for leave to file the status report.

the court's finding that Jazz has failed to demonstrate that allowing defendant a reasonable time (in this instance, the ten-day automatic stay provided under the Federal Rules of Civil Procedure) is likely to cause Jazz irreparable harm. The deposition testimony, as mentioned previously, also corroborates that Jazz has a pressing need to obtain goods to fill current orders.

As part of the pleadings in Court No. 04–00442, Jazz filed two documents that relate generally to the issue of its immediate need for the release of merchandise.[11] On October 28, 2004, Jazz filed with the court a report "concerning matters requiring immediate determination." Appended thereto were certain confidential documents offered to show business exigencies supporting the need for an immediate determination. Plaintiff did not move to reopen the record or otherwise move to admit these documents into evidence, and they have not been admitted into evidence.[12]

Such evidence as is available on the record to this court is insufficient to support a factual conclusion that Jazz will have to cease business operations if it does not obtain immediate release of the specific merchandise this court has found to be admissible. Also, the evidence on the record before this court is insufficient to establish that a time period of 10 days between entry of judgment and enforcement of that judgment will cause Jazz such harm that this court should deny defendant a meaningful opportunity to obtain a stay pending appeal.

C. Conclusions of Law on the Rule 62(a) Issue

The purpose of the 30-day stay provided for in Rule 62 of this Court's Rules, and the 10-day stay provided by Rule 62(a), Fed. R. Civ. Pro., is to allow a losing party an opportunity to secure a stay pending appeal. The opportunity to seek such a stay is a legitimate and necessary element in the judicial process. Further, the United States has a legitimate interest in preventing the entry of merchan-

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[11] In the pleadings filed in that preceding action, plaintiff submitted an affidavit of Jazz Chief Executive Officer Jack Benum, dated September 26, 2004. In that affidavit, Mr. Benum stated that: unless Jazz secures relief from this court it is expected to be forced out of business within days; selling LFFPs represented 85% of Jazz's business; due to Customs action Jazz has run out of merchandise and is without cash flow; without release of the subject merchandise Jazz will suffer cancellation of customer orders and likely loss of future business. Jazz also filed a cash flow report in the previous case. Neither has been admitted to the record in this case. Even had plaintiff done so, the court concludes that those documents would not have established the likelihood of harm to Jazz sufficient that it would convince this court to dispense with a 10-day automatic stay. The affidavit was not accompanied with corroborating evidence. The cash flow report does not provide the court an independent basis to conclude that the court's allowing for a 10-day stay period is likely to injure Jazz.

[12] These documents, even had they been admitted to the record, would not be sufficient to cause this court to conclude, in the context of all the evidence of record, that the 10-day automatic stay period should not apply.

dise it believes to be in violation of the Exclusion Order. The factor of "public interest to be served" also favors the position of defendant that it should have a reasonable opportunity to seek a stay pending appeal. Neither side disputes that if the merchandise were released, there would be no opportunity for subsequent redelivery. For these reasons, the court will not eliminate the ability of defendant to seek a stay pending appeal, nor does it wish, on the facts presented by this case, to shorten the time the Court of Appeals will need to consider any motion to stay to a period less than that ordinarily applying to civil cases. Some balance must be struck between the competing interests of Jazz to obtain expeditious release of the portion of the subject merchandise for which it has established admissibility, and the interests of the defendant to have a motion to stay considered by the Court of Appeals.[13]

The court concludes that defendant United States will suffer no significant prejudice from the shortening of the automatic stay to 10 days, the same amount of time that applies in civil cases in the district courts.[14] In addition, the court, on November 1, 2004, notified the parties of preliminary conclusions of law and fact on permissible repair and first sale and explained the need for the court to obtain a resolution of the issues concerning segregation of the merchandise tentatively found to be inadmissible. This action placed the defendant on notice as to the probable outcome of this case and provided an opportunity for defendant to begin to prepare a motion to stay prior to entry of judgment.

The court finds that irreparable harm, stemming from the unavailability, for almost all of the holiday selling season, of the merchandise found to be admissible by this court, is likely to befall Jazz if the full 30-day stay is required. The court also finds that it is possible to balance the competing hardships of the parties by providing for a 10-day stay. In light of the foregoing, the court will order that its judgment directing the release of all merchandise deemed admissible within the two subject entries will be stayed for ten business

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[13] Counsel for defendant stated at a point late in the proceedings that while defendant would object to any shortening of the 30-day automatic stay, it would need an absolute minimum automatic stay of five days in order to seek a stay pending appeal. The court declines, on the particular facts shown in this case, to shorten the automatic stay of Rule 62(a) to five days. As discussed herein, plaintiff has not shown that the 10-day period, which is the period provided for under the Federal Rules of Civil Procedure, is likely to cause it irreparable harm. During a five-day period, defendant would need to seek a stay in this court, then if unsuccessful prepare and file a motion to stay in the Federal Circuit. The voluminous record in this case would limit the opportunity of the Court of Appeals to consider fully the issues that may be raised in such a motion.

[14] Because, under this Court's Rules (as under the Federal Rules of Civil Procedure), the ten-day period does not include intervening holidays and weekends, the actual time period of the automatic stay is the equivalent of 15 calendar days, or half the time period that would apply were the court to make no special ruling on the automatic stay period provided for under USCIT R. 62(a).

days, which period will expire on December 2, 2004. The standard 30-day stay of enforcement under Rule 62 will not apply.

VIII. Resolution of Remaining Outstanding Motions

A. Continuing Objections by Defendant to Admissibility of Exhibits

At trial, defendant objected to the admission of plaintiff's documentary exhibits, claiming that the proffering witnesses failed to authenticate certain documents within those exhibits in accordance with Fed. R. Evid. 901. Specifically, defendant argued that the proponents of the evidence could not show that the evidence is what the proponents claim it to be. At trial, the court admitted most of plaintiff's exhibits but segregated some of the documents into two parts (designated "A" and "B") of plaintiff's Exhibits 1 through 7 and 9 through 14,[15] noting defendant's objection to for the record and giving the government an opportunity to further explain the objection in post-trial briefing.[16] Upon review of the government's argument, plaintiff's memorandum in support of admission, and the trial record, the court overrules the defendant's objections and affirms its ruling to admit the exhibits without condition, with the exception of a small number of documents.[17]

Plaintiff sought to lay the foundation for the admissibility of the exhibits at issue through the testimony of Messrs. Silvera and Zawodny that the documents were business records of either Photo Recycling or Jazz, and that they qualified for admission under the business records exception to the hearsay rule. *See* Fed. R. Evid. 803(6). The government contended that Messrs. Silvera and Zawodny could not properly authenticate the business records because, in its view, these two witnesses "were without knowledge of the process by or location at which . . . the documents were generated." *Def.'s Post-Trial Br.* at 22.

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[15] Portions of plaintiff's exhibits 1 through 7 and 9 through 14 contained pages of the exhibits to which the defendant did not object. Parts B of the same exhibits contained those pages that the defendant specifically objected on authentication grounds.

[16] The government raised the same objection to plaintiff's exhibits 16, 17, 19 and 20. A deposition of Mr. Jack Benum, Chief Executive Officer of Jazz, was held on Friday, October 15, 2004, for the limited purpose of addressing the issue of admissibility of the documents. At trial, after resumption of court proceedings, the government withdrew its additional hearsay objection to Plaintiff's Exhibit 20 (pre-marked as Plaintiff's Exhibit 4) but preserved its authentication objection for further consideration by the court.

[17] Defendant objected to Bates number 78 of Plaintiff's Exhibit 7B on the additional ground that the document is incomplete and unreliable. The court sustains defendant's objection and strikes Bates number 78 from the trial record. Additionally, the court reserved its evidentiary ruling on Bates numbers 223 and 229 of Plaintiff's Exhibit 17; plaintiff withdrew its motion to admit those pages into the record in these proceedings during a sidebar discussion.

The court disagrees with defendant's contention. "The proponent need not establish a proper foundation through personal knowledge; a proper foundation 'can rest on any manner permitted by Federal Rule of Evidence 901(b) and 902.' " *United States v. Pang*, 362 F.3d 1187, 1193 (9th Cir. 2004) (citing *Orr v. Bank of America, NT & SA*, 285 F.3d 764, 774 (9th Cir. 2002)). The government's objection to the admissibility of the business records amounts to an objection that plaintiff did not proffer a witness or affidavit from the companies that generated all the documents contained within the documents proffered as business records. *See Def.'s Post-Trial Br.* at 22; Tr. at 238–297, 417–45, 477–504, 557–63, 635–40.

The contention that each and every business document offered into evidence must be separately authenticated by a witness from the entity that prepared the document, however, has no basis in law. *See United States v. Jakobetz*, 955 F.2d 786, 800–01 (2d Cir. 1992) (holding that "[e]ven if the document is originally created by another entity, its creator need not testify when the document has been incorporated into the business records of the testifying entity" (citation omitted)). Defendant's narrow reading of the requirement of Fed. R. Evid. 901 essentially would swallow the 803(6) business records exception and prevent most entities from using documents at trial that are germane to the operation of their businesses.

Mr. Silvera testified that he is familiar with the documents contained in the business record of Photo Recycling and that the exhibits at issue were in fact business records generated and/or maintained or integrated during the ordinary course of Photo Recycling's business. *See* Tr. at 225–47, 257–97. Although Mr. Zawodny could not testify definitively that every document within the subject exhibits were "records of operation" maintained by Jazz in the ordinary course of business, he was able to identify the exhibits as business records and explain the contents of each document and their significance to Jazz's business operations. *See* Tr. at 463–98. After a deposition was taken of Jazz's Chief Executive Officer, the government conceded that the documents used to elicit testimony from Mr. Zawodny were, in fact, business records of Jazz and stipulated that Plaintiff's Exhibit 20 contains documents that are maintained as part of Jazz's business records. The government withdrew its hearsay objection to Plaintiff's Exhibit 20, but reserved its objection under Fed. R. Evid. 901 to all business records proffered by Mr. Zawodny that were not produced by Jazz.

The witnesses purport that the documents at issue are either business records of Photo Recycling or Jazz. The trial testimony of Messrs. Silvera and Zawodny and the government's consent to waive its hearsay objection in light of Mr. Benum's deposition have, for purposes of Fed. R. Evid. 901, established that the documents are what the proponents claim; therefore, the grounds for any authentication objection have been extinguished. Fed. R. Evid. 901(a) ("The require-

ment of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."); *see* MCCORMICK ON EVID. § 292 (5th Ed.) ("[W]hen the business offering the records of another has made an independent check of the records, has integrated them into their own business operation, or can establish accuracy by other means, the necessary foundation may be established.") The law of the Federal Circuit instructs that it is of no consequence that the witnesses who laid the foundation for admissibility did not generate, prepare, or maintain the records, or even work at the record-keeping entity as an employee. *Conoco Inc. v. Dep't of Energy*, 99 F.3d 387, 391–92 (Fed. Cir. 1996); *Munoz v. Strahm Farms, Inc.*, 69 F.3d 501, 503–04 (Fed. Cir. 1995); *see also Saks Int'l, Inc. v. M/V Exp. Champion*, 817 F.2d 1011, 1013 (2d Cir. 1987); *United States v. Basey*, 613 F.2d 198, 201 n.1 (9th Cir. 1979), *cert. denied*, 446 U.S. 919 (1980).

The court has no reason to question the testimony and circumstantial evidence that these exhibits are actually business records of either Photo Recycling or Jazz or the testimony of the witnesses relating to their reliance on such records. Any questions as to the extent of a witness' personal knowledge of the contents of the business records will be considered by the trier of fact, in this case the trial court, only in determining the credibility of the witness and the weight to be accorded to the solicited testimony. *See United States v. Stavroff*, 149 F.3d 478, 484–485 (6th Cir. 1998) (citation omitted). Defendant also objected, on authentication grounds, that some of the documents are not on the letterhead of the entities that generated them and that some contain text in Chinese. That some of the documents contained within the business records are written in a foreign language or not produced upon company letterhead does not defeat admissibility but instead affects only the probative value of such documents, a determination that is reserved for the trier of fact.

B. Defendant's Motion for Judgment on Partial Findings

At the close of plaintiff's case in chief, defendant moved for judgment on partial findings pursuant to Rule 52(c) of this Court. Defendant argued that Jazz failed to establish, by a preponderance of the evidence, that the shells used to produce the cameras in the two subject entries were first sold in the United States. To make its argument, defendant pointed to what it claimed were several deficiencies in Jazz's case in chief, including the fact that Jazz presented no evidence to establish the origin of the Seven Buck's shells. Tr. 645–64. During trial, the court reserved ruling on defendant's Rule 52(c) motion and now denies this motion for the reasons that are subsumed in the findings of fact and conclusions of law set forth in this opinion.

C. Defendant's Motion to Reopen the Trial Record

On October 19, 2004, the day following the conclusion of the trial, defendant made an emergency motion to reopen the trial record for the single and limited purpose of introducing one "sample" Jazz disposable camera that, according to the motion, was drawn by Customs at random from one of the two entries at issue. Defendant sought to introduce this camera into evidence through proffered testimony of a Customs senior import specialist, Mr. Dan Johnson. That testimony would be offered solely for the purpose of establishing chain of custody, *i.e.*, that the senior import specialist had obtained the camera from one of the entries and had marked the sample with the entry number.

Defendant represented that the camera it offered for admission into evidence, revealed, following removal of Jazz's label, original bilingual labeling in English and French and that such labeling indicated that the camera originally was intended for sale in a foreign country. Counsel for defendant acknowledged that the camera was in their possession since the first day of trial but argued that the expedited trial schedule prevented the government from inspecting the samples and "obtain[ing] a full appreciation of their relevance prior to trial." *Def.'s Emergency Mot. to Reopen the R.* at 2. In its motion, defendant claimed that this camera is "newly discovered evidence that is highly relevant to the first sale issue" and maintained that Jazz would be in no way prejudiced by its introduction because plaintiff should be aware of the contents of its entries. *Id.* at 3. During the court's emergency hearing held at the request of defendant and conducted by telephone because counsel for the United States was not present in New York at the time, the court orally denied defendant's motion and explained why that motion, as written, was not being granted.

It is well established that it is within the trial court's discretion to reopen the record. *See Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 551 (1983); *see also Enzo Biochem, Inc. v. Calgene, Inc.*, 188 F.3d 1362, 1379–80 (Fed. Cir. 1999). In determining whether or not to reopen the evidentiary record, a trial court considers the probative value of the evidence proffered, the proponent's explanation for failing to offer such evidence earlier and the likelihood of undue prejudice to the proponent's adversary. *See Blinzler v. Marriott Int'l, Inc.*, 81 F.3d 1148, 1160 (1st Cir. 1996) (citing *Rivera-Flores v. Puerto Rico Tel. Co.*, 64 F.3d 742, 746 (1st Cir. 1995); *Joseph v. Terminix Int'l Co.*, 17 F.3d 1282, 1285 (10th Cir. 1994); 6A JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 59.04[13], at 59.33 (2d ed. 1993)); *see also Confederated Tribes of the Warm Springs Reservation of Or. v. United States*, No. 02–5167, 2004 U.S. App. LEXIS 11249, at *11 (Fed. Cir. June 8, 2004) (non-precedential). Defendant's motion failed to satisfy these three factors. First, the court could accord little probative weight to a single camera (one out of a total of ap-

proximately 160,000 cameras in the two entries) offered by itself to show that the plaintiff had failed to meet its burden of establishing first sale. The camera would be relevant to the issue of the effectiveness of the shell sorting activity undertaken by Polytech, but meaningful findings of fact on this issue would require statistically valid sampling of both entries.

Regarding the second factor, the conducting of these proceedings, on an expedited basis, allowed the United States and its agency, Customs, the opportunity to examine the merchandise that was the subject of this litigation. The court recognizes that the parties conducted discovery and trial proceedings according to an accelerated schedule; however, the court notes that the parties agreed to the expedited schedule during pre-trial conferences and also agreed to the court's pre-trial order. Moreover, the court sees no reason why defendant could not have moved into the record during trial a group of twenty cameras that, according to the motion, Customs had removed from the two shipments and sent to the court at the request of counsel for the United States. These cameras were placed on the Exhibit Table, in plain sight in the courtroom, where they remained throughout the proceedings. At no time during trial did the government attempt to introduce into evidence any of these twenty cameras. These cameras, and the specific camera described by defendant, could have been used in the government's cross-examination of Mr. Zawodny, who testified concerning the sampling conducted by Polytech.

Additionally, the merchandise that was the subject of this action was in the custody or constructive custody of Customs since its importation in late August of this year. Customs made three administrative determinations with respect to that merchandise prior to the filing of this case. It made an initial determination to detain the merchandise pursuant to 19 U.S.C. § 1499(c)(1) (2000). It denied the release of the merchandise on September 24 and 26, 2004, thus making the admissibility determination that is the subject of 19 U.S.C. § 1499(c)(1) and that constituted the exclusion determination addressed in 19 U.S.C. § 1514(a)(4). Finally, Customs denied Jazz's administrative protest of the exclusion determination, Jazz's contesting of which resulted in this action. Thus, Customs had numerous opportunities to examine and sample the merchandise during the time available for considering Jazz's pleas for administrative relief.

Under the third factor, defendant's motion on its face demonstrates the likelihood of undue prejudice to the plaintiff. As submitted, the motion was manifestly unfair in declining to present the plaintiff with any meaningful opportunity to present new evidence and, instead, limiting the introduction of evidence to just one of the twenty cameras on the Exhibit Table. Defendant's motion would have the court restrict plaintiff's opportunity to rebut this evidence

to cross-examination of Mr. Dan Johnson "regarding his selection of these samples and his markings of the entry numbers on the outer boxes of these cameras." *Def.'s Emergency Mot. to Reopen the R.* at 3.

The court, during the emergency hearing on defendant's motion, informed the parties that in giving its reasons for denying the motion it was not indicating that it necessarily would deny any motion to reopen the trial record. As the court then notified the parties, were a motion of the general type made by defendant to avoid undue prejudice, it would have to provide for opening of the trial record to allow both sides the opportunity to produce evidence on the issue or issues for which admission into evidence of the single camera was being offered. Although defendant, during a telephonic conference on the record concerning the issue of segregation of merchandise, orally renewed its denied motion, defendant did not submit another written motion during these proceedings to reopen the trial record.

D. Other Outstanding Motions

The parties and *amicus curiae* made a number of other motions that remain outstanding. The court disposes of these motions as follows: (1) plaintiff's motion to consolidate Court Nos. 04–00442 and 04–00494, filed on October 4, 2004 is denied as moot; (2) *amicus curiae's* motion to file post-hearing brief on legal issues, filed October 15, 2004 is granted; (3) *amicus curiae's* motion to file post-trial brief, filed on October 20, 2004 is granted; (4) Letters of *amicus curiae* filed on October 21, 2004, October 22, 2004, and October 25, 2004 are ruled out of order and are struck from the record; (5) defendant's motion to strike plaintiff's "Report Concerning Matters Requiring Immediate Determination" filed on October 29, 2004 is denied as status reports from parties are an appropriate means of communicating with the court; (6) *amicus curiae's* motion to file a brief on waiver of automatic stay filed on November 5, 2004 is denied as beyond the scope of the issues for which *amicus curiae* status was previously granted; (7) *amicus curiae's* motion to file a reply brief on waiver of the automatic stay filed on November 8, 2004 is denied as beyond the scope of the issues for which *amicus curiae* status was previously granted; (8) defendant's motion to supplement the record and to strike *amicus curiae's* motion to reopen the record filed on November 12, 2004 is granted and the November 10, 2004 deposition of Joseph M. Weber is admitted as Defendant's Exhibit A; (8) defendant's motion to strike plaintiff's status report dated November 13, 2004, filed on November 16, 2004, is denied, plaintiff having the right to respond to defendant's motion of November 12, 2004 to reopen the record. Other motions made orally or in writing are hereby denied as moot or subsumed in the judgment.

IX. Disposition of the Imported Merchandise

The court will order immediate release of the merchandise for which plaintiff has met its burden of establishing admissibility, subject only to the 10-day automatic stay of enforcement of the judgment, discussed previously. The remaining merchandise in the two entries is excluded from entry. Because, as the parties agree, that excluded merchandise has remained in the constructive custody of Customs, an order for redelivery is unnecessary. The ordinary disposition of merchandise entered in good faith but subsequently deemed not to be entitled to admission is the opportunity for the importer to export or destroy the excluded merchandise under the supervision of Customs. *See* 19 C.F.R. § 158.45(c) and 158.41(c) (2004). Defendant has not sought otherwise. The court concludes that the excluded merchandise shall be allowed to be exported or destroyed under the supervision of Customs.

X. Conclusion

For the foregoing reasons, the court finds that plaintiff has met, by a preponderance of the evidence, its burden of establishing the admissibility of those LFFPs at issue in this case that are neither included in plaintiff's Master Lot Number 463, nor commingled in inner cartons with LFFPs from plaintiff's Master Lot Number 463. Because plaintiff has established, for those LFFPs, that it has satisfied the legal requirements of first sale, permissible repair, and segregation, the court concludes that those LFFPs are outside the scope of the General Exclusion Order against *Certain Lens-Fitted Film Packages*, USITC Inv. No. 337–TA–406, Pub. No. 3219 (1999) and are entitled to entry and release from the custody of Customs.

For reasons also stated previously, plaintiff has failed to meet its burden of establishing that the LFFPs in the subject shipments that are included in plaintiff's Master Lot Number 463 are outside the scope of the General Exclusion Order. Plaintiff further has failed to establish segregation of the LFFPs that are located in inner cartons that contain LFFPs from Master Lot Number 463 and also contain LFFPs of other Master Lot Numbers. These LFFPs are excluded from entry and may be exported or destroyed, under the supervision of Customs. Judgment for plaintiff in part and for defendant in part will be entered accordingly.

Slip Op. 04–149

SERGIO U. RETAMAL, Plaintiff, v. U.S. CUSTOMS AND BORDER PROTECTION DEPARTMENT OF HOMELAND SECURITY, Defendant.

Court No. 03–00613

[Defendant's motion for summary judgment granted; action dismissed.]

Decided: November 24, 2004

Sergio U. Retamal pro se.

Peter D. Keisler, Assistant Attorney General; *Barbara S. Williams*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Harry A. Valetk*); and Office of Associate Chief Counsel, Customs and Border Protection, U.S. Department of Homeland Security (*Christopher Merrill* and *Marc Matthews*), of counsel, for the defendant.

Opinion

AQUILINO, Judge: The Tariff Act of 1930, as amended, requires each person who has been granted a broker's license to file with Customs on February 1 of every third year a report as to (a) whether such person is actively engaged in business as acustoms broker; and (b) the name under, and the address at, which such business is being transacted. 19 U.S.C. § 1641(g)(1). *Cf.* 19 C.F.R. § 111.30(d) (2003):

> . . . The report must be accompanied by the fee prescribed in § 111.96(d) and must be addressed to the director of the port through which the license was delivered to the licensee. . . . A report received during the month of February will be considered filed timely. No form or particular format is required.

Subsection (2) of 1641(g) provides:

> If a person licensed under . . . this section fails to file the required report by March 1 of the reporting year, the license is suspended, and may be thereafter revoked subject to the following procedures:
>
> (A) [Customs] shall transmit written notice of suspension to the licensee no later than March 31 of the reporting year.
>
> (B) If the licensee files the required report within 60 days of receipt of the [Customs] notice, the license shall be reinstated.
>
> (C) In the event the required report is not filed within the 60-day period, the license shall be revoked without prejudice to the filing of an application for a new license.

I

Comes now the above-named plaintiff *pro se*, complaining about revocation of his broker's license "by operation of law on May 6, 2003", to quote a letter to him from the Customs Interim Port Director, Los Angeles - Long Beach Seaport, returning therewith on or about June 5, 2003 his "check . . . and Status Report that was received on May 28, 2003," a copy of which communication is appended to the complaint. This pleading prays that the court order the defendant to accept that report and requisite $100 fee and that the revocation be reversed.

Such relief was not available upon attempted appeal to Customs headquarters in Washington, D.C. And its counsel have now interposed a motion styled as one to dismiss pursuant to Court of International Trade Rule 12(b)(5) "for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted." Of course, a motion to dismiss on the ground of lack of jurisdiction over the subject matter properly lies under Rule 12(b)(1). Moreover, the defendant has filed the certified administrative record, and Rule 12(b) states that, if

> on a motion asserting the defense numbered (5) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside of the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such motion by Rule 56.

Subsection (h) of Rule 56 provides in turn that, upon any motion for summary judgment,

> there shall be annexed to the motion a separate, short and concise statement of the material facts as to which the moving party contends there is no genuine issue to be tried.

This counsel for the defendant have not done, nor does the filing of an administrative record satisfy this requirement.[1]

A

Be this shortcoming as it may, the court reads plaintiff's holographic pleading in its most favorable light. Among other things, he avers that on April 30, 2003 he prepared his triennial report, drew a

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[1] *But see* 19 U.S.C. § 1641(e)(1):

. . . In cases involving revocation . . . of a license . . ., [Customs] shall file in court the record upon which the decision or order complained of was entered, as provided in section 2635(d) of Title 28.

check for $100, and gave them to his assistant to mail to Customs; that on or about May 21st his assistant informed him that the report and fee had not, in fact, been mailed; that on May 24, 2003 both were forwarded to Customs via certified mail; that on May 28th he was informed via telephone by the agency that his license had been [suspended[2]] on March 7, 2003 and that a notice thereof had been sent on that date to his "previous home address" which he "did not receive . . . and U.S. Customs confirmed that such letter had been returned to sender unsigned"[3]; that on June 23rd he filed a written petition for administrative relief from the revocation, followed on August 20, 2003 by a telephone plea to that effect, both of which were denied, the latter upon a stated representation that "there was no recourse available and . . . the decision was final."[4] Whereupon the plaintiff concludes that

> this . . . is unfair, it completely denies due process, and the punishment is disproportional to the injury that U.S. Customs . . . may suffer from such unintentional delay.[5]

Whatever the intent, an axiom of this freedom-loving nation has been that you may delay, but time will not[6], and a maxim of its common law has been to aid the vigilant and not those who slumber on their rights. Here, of course, any rights implicated are exclusively those that have been enacted by the sovereign. Equity has no permissible role.

As a broker duly licensed by the government[7], the plaintiff was subject to 19 C.F.R. § 111.30(a) (2003), to wit:

> *Change of address.* When a broker changes his business address, he must *immediately* give written notice of his new address to each director of a port that is affected by the change of address. In addition, if an individual broker is not actively engaged in transacting business as a broker and changes his nonbusiness mailing address, he must give written notice of the new address in the status report required by paragraph (d) of this section.

Emphasis added. Plaintiff's complaint bears the address 2666 Derby Drive, San Ramon, California 94583. His form Customs Brokers Tri-

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[2] While the complaint states "revoked", defendant's Administrative Record ("AR") confirms "suspended" on March 7, 2003. *See* Tab 4.

[3] Complaint, para. 9.

[4] *Id.*, para. 13.

[5] *Id.*, para. 15.

[6] *See, e.g.*, Poor Richard's Almanack, *Poor Richard Improved, 1758: Preface* (including "*The Way to Wealth*"), *Maxims*, available at http://usinfo.state.gov/usa/infousa/facts/loa/bf1758.htm.

[7] *See* AR, Tab 1.

ennial Status Report [-] Individual, timely dated February 1, 2000 and marked recorded by the Service on February 13th, listed his mailing address as 2312 Canyon Village Circle in San Ramon. 94583. *See* AR, Tab 3. That is where the Port Director sent on March 7, 2003 per certified mail her written notice of the suspension of plaintiff's license, which notice was returned by the Postal Service to the sender as unclaimed. *See id.*, Tabs 4, 5. Apparently, that is also the "old" address that the plaintiff refers to in his memorandum in opposition to defendant's motion. There is no indication when it became old. There is no indication that he made any attempt after February 1, 2000 to notify Customs of his changed location. Indeed, the plaintiff argues in his memorandum that his address "was not required to be updated more than every three years." In sum, then, the court cannot find that the plaintiff was in compliance with the primary dictate of 19 C.F.R. § 111.30(a), *supra*. That is, there was no immediate written notice of the change given to Customs. Moreover, even if the court were to credit plaintiff's interpretation of the additional requirement of that regulation, had he filed a timely status report in February 2003, as he did in February 1997[8] and again in February 2000, this action surely would not have reached the court's docket.

But it did as of August 27, 2003. The Clerk of Court's letter, acknowledging receipt on that date of plaintiff's complaint and filing fee, informs him that this type of case "must be commenced . . . within 60 days after notice of the decision of [Customs]." *See* 19 U.S.C. § 1641(e)(1); 28 U.S.C. § 2636(g). Both statutes refer to 60 days after revocation within which to come to this Court of International Trade. The record in this matter reflects that the date of revocation was May 6, 2003. *Compare* AR, Tab 4 *with id.*, Tabs 7, 8. It also reflects receipt by the plaintiff of notice thereof on or about June 14, 2003. *Compare* AR, Tab 8 *with id.*, Tabs 9, 10. Hence, even if the plaintiff were to be given the benefit of all doubts in this matter, this action is still time-barred by the above-cited statutes of limitation.

II

In view of the foregoing, defendant's motion must be granted; summary judgment will enter accordingly.

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[8] *See id.*, Tab 2.

Slip Op. 04–150

GILDA INDUSTRIES, INC., Plaintiff, v. UNITED STATES, Defendant.

Consol. Court. No. 03–00203
Before: Barzilay, Judge

[Plaintiff's motions denied; Defendant's Motion to Dismiss Granted.]

Decided: December 1, 2004

(*Peter S. Herrick*) for Plaintiff.

Peter D. Keisler, Assistant Attorney General; (*David M. Cohen*), Director; (*Jeanne E. Davidson*), Deputy Director, (*David S. Silverbrand*), Trial Attorney, U.S. Department of Justice, Civil Division, Commercial Litigation Branch; *William Busis*, Office of General Counsel, Executive Office of the President, Office of the United States Trade Representative, of counsel; *Yelena Slepak*, International Trade Litigation, Bureau of Customs and Border Protection, of counsel, for Defendant.

OPINION

BARZILAY, JUDGE:

Plaintiff Gilda Industries Incorporated ("Gilda") has filed several motions that are at issue in this proceeding. They include a motion for class certification, motion for writ of mandamus and declaratory relief, motion to join the United States Trade Representative and Commissioner of Customs and Border Protection as defendants, motion to supplement its Response to Defendant's Motion to Dismiss, and finally, motion to amend its amended complaint.[1] Also before the court are Defendant United States' ("Government" or "United States Trade Representative" or "USTR") motions to dismiss both of Plaintiff's complaints (original and amended) for failure to state a claim upon which relief can be granted. Plaintiff has subsequently abandoned its motion for Writ of Mandamus with respect to all liquidated entries, but seeks mandamus with respect to prospective entries on the basis that the retaliation list has terminated by operation of law. *See Pl.'s Opp. to Deft.'s Mot. to Dismiss, at 15; Oral Argument Tr.*, 20–21. Because the court finds that the retaliation list has not terminated by operation of law, as discussed *infra*, Plaintiff's arguments seeking Writ of Mandamus need not be addressed.

Gilda, an importer of toasted breads from Spain, filed suit to challenge the USTR's compilation and administration of a "retaliatory list," created pursuant to both section 301 of the Trade Act of 1974, (19 U.S.C. § 2411 (2004)), and a WTO Appellate Body decision authorizing retaliatory action against the European Community. Gilda

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[1] Plaintiff's motion to supplement the record is granted and motion to amend its amended complaint is denied. All other motions not specifically addressed in this opinion are hereby denied as moot or subsumed in the judgment.

claims that toasted breads — a product it imports — should not have been included on the retaliation list and that the USTR failed to rotate products off the list as required by the relevant statute. Thus, Gilda seeks to have its products removed from the retaliatory list and also to have those entries reliquidated that were made after the date it claims its products should have been rotated off the list. Gilda also seeks a refund of the 100% duties it has already paid, with interest.

In its amended complaint, Gilda adds the Administrative Procedure Act, 5 U.S.C. § 702 ("APA") as a basis for its claim and argues that the USTR's failure to hold public hearings on modification of the retaliation list constitutes a violation of its procedural due process rights under the Fifth Amendment to the Constitution. As discussed below, the court has jurisdiction over this matter pursuant to 28 U.S.C. § 1581(i) (2000). For the following reasons, the Government's motion to dismiss is granted and Gilda's motions for writ of mandamus and declaratory relief, class certification, and joinder are all denied.

I. Background

This case stems from a dispute between the European Community ("EC") and the United States resulting from the former's ban on the importation of hormone treated animals and meat. A World Trade Organization ("WTO") Dispute Settlement Body ("DSB") panel determined that the EC hormone ban is not based upon scientific evidence, a risk assessment, or relevant international standards and is therefore contrary to the EC's obligations under the Agreement on the Application of Sanitary and Phytosanitary Measures ("SPS Agreement"). This determination was affirmed by the WTO Appellate Body. Pursuant to the EC's failure to subsequently implement the DSB recommendations by the May 13, 1999 deadline, the USTR published *Implementation of WTO Recommendations Concerning EC Measures Concerning Meat and Meat Products (Hormones)* ("Hormones Implementation") in the Federal Register. 64 Fed. Reg. 14,486 (Mar. 25, 1999).

The March 25th Federal Register notice published a preliminary list of specified EC products, announced that the United States would suspend tariff concessions on these products, and asked for public comment.[2] Gilda did not submit comments or take part in

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[2] The Federal Register notice stated the following:

> The USTR requests comments on the types of concessions that may be appropriate for suspension pursuant to Article 22 of the DSU if the EC does not implement the [WTO Dispute Settlement Body] recommendations concerning the hormone ban . . . The USTR proposes that the imposition of 100 percent ad valorem duties on selected products of the EC is an appropriate action and that the products be drawn from the list of products set forth in the Annex to this notice. . . .

these proceedings. On April 19, 1999, the USTR conducted a public hearing to receive testimony on the preliminary list. Again, although the preliminary list included the HTSUS subheading classifying toasted breads, Gilda did not take part in this hearing or otherwise challenge the inclusion of this HTSUS subheading on the retaliatory list. *See Pl.'s Opp. to Deft.'s Mot. to Dismiss*, at 15.

On July 27, 1999, the USTR published *Implementation of WTO Recommendations Concerning EC Measures Concerning Meat and Meat Products (Hormones)* in the Federal Register and raised duties on EC products pursuant to section 301 of the Trade Act of 1974.[3] Included in the Annex described in the *Hormones* list was HTSUS subheading 9903.02.35 which includes "[r]usks, toasted bread and similar products (provided for in subheading 1905.40)." Therefore, in accordance with the Hormones Implementation, Gilda's products were subjected to 100% duties. To this date, the USTR has not modified the retaliation list and continues to negotiate with the EC in an effort to resolve the Hormones dispute. *Deft.'s Mot. to Dismiss*, at 13.

II. Jurisdiction

Plaintiff originally brought its complaint and claim for class certification under 28 U.S.C. § 1581(a), its protests having been denied by Customs. During a conference call with the parties, the court noted that its jurisdiction under section 1581(a) is limited to those entries for which all statutory requirements have been satisfied. The court also discussed the particular difficulties with maintaining a class action under the unique jurisdictional structure of section

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Section 306(c) of the Trade Act provides that the USTR shall allow an opportunity for the presentation of views by interested persons prior to the issuance of a determination pursuant to section 306(b). The USTR invites interested persons to: (1) provide written comments on the proposed suspension of concessions; and (2) to present written and oral testimony and rebuttal briefs in the context of a public hearing. Written comments and written oral testimony may address: the appropriateness of imposing increased duties on the products listed in the Annex to this notice; the levels at which U.S. customs duties should be set for particular items. . . .

Written comments, written testimony, and rebuttal briefs will be placed in a file open to public inspection. . . .

64 Fed. Reg. 14,486 (March 25, 1999).

[3] Section 301 provides for the following:

(a) Mandatory Action.

(1) If the United States Trade Representative determines under section 403(a)(1) [19 U.S.C. § 2414(a)(1)] that —

(A) the rights of the United States under any trade agreement are being denied; or

(B) an act, policy, or practice of a foreign country —

(i) violates, or is inconsistent with, the provisions of, or otherwise denies benefits to the United States under any trade agreement, or

(ii) is unjustifiable and burdens or restricts United States commerce, the Trade Representative shall take action authorized in subsection (c), subject to the specific direction, if any, of the President regarding any such action . . . to enforce such rights or to obtain the elimination of such act, policy, or practice. . . .

19 U.S.C. § 2411 (2004).

1581(a). Subsequently, Plaintiff moved to amend its complaint, invoking the Court's residual jurisdiction, 28 U.S.C. § 1581(i) in the alternative. Because jurisdiction under section 1581(a) is limited to only those entries that have been validly protested, denied and duties paid, it does not allow the court to address the forward-looking relief that Plaintiff seeks. Thus, the court will examine its jurisdiction under section 1581(i).

Section 1581(i) confers upon this court exclusive jurisdiction over any civil action commenced against the United States, its agencies, or its officers that arises out of any law of the United States providing for duties on the importation of merchandise for reasons other than the raising of revenue. 28 U.S.C. § 1581(i)(2). This court, however, may exercise its jurisdiction pursuant to section 1581(i) only when the case directly relates to the proper administration and enforcement of an international trade law *and* no other basis for jurisdiction is available or the basis that is available will yield a remedy which is manifestly inadequate. *Nat'l Corn Growers Ass'n v. Baker*, 840 F. 2d 1547, 1555 (Fed. Cir. 1987) (emphasis added); *see also Miller & Co. v. United States*, 824 F. 2d 961, 963 (Fed. Cir. 1987), *cert. denied*, 484 U.S. 1041 (1988). Therefore, the court must determine whether a basis for (i) jurisdiction exists. That is, whether relief under any other jurisdictional provision would be manifestly inadequate. In the case at hand, Gilda seeks to challenge the USTR's inclusion of the HTSUS subheading providing for toasted breads on the retaliation list. It also seeks to compel the USTR to remove this subheading from the list, and to have its duties refunded — all of which are unrelated to the liquidation of its entries by the Bureau of Customs and Border Protection and the denied protests. Thus, because Plaintiff seeks to challenge the USTR's imposition of duties pursuant to section 301 of the Trade Act for reasons related to fostering a change in EC policy, section 1581(i)(2) applies. Furthermore, because any remedy available under section 1581(a) would be directed at Customs and not the USTR, the relief plaintiff is seeking — that it be removed from the retaliation list and be reimbursed 100% duties — cannot be obtained under this section. Because any remedy under section 1581(a) would therefore be manifestly inadequate in obtaining the relief sought, and because no other jurisdictional provision is applicable, this court has jurisdiction to hear Plaintiff's case pursuant to 28 U.S.C. § 1581(i).

Plaintiff has also moved for class certification, purporting to represent "others similarly situated."[4] USCIT Rule 23(c) provides that as soon as practicable after the commencement of an action brought as

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[4] Apparently, Plaintiff refers to other importers of products currently being subjected to 100% duties as a result of being included on the *Hormones* list. None has come forward or has been identified to the court. Furthermore, both the court and Defendant are unaware of any other pending litigation related to the *Hormones* list.

a class action, the court shall determine by order whether it is to be so maintained. Rule 23(a) sets out four prerequisites to class action. First, the class must be so numerous that joinder of all members is impracticable. Second, there must be questions of law or fact common to the class. Third, the claims or defenses of the representative parties must be typical of the claims or defenses of the class, and finally, the representative parties must fairly and adequately protect the interests of the class. Because no other class members can be identified the court cannot determine whether joinder is practicable; there are no identifiable common questions of law or fact; and it is unclear whether Plaintiff's claims and defenses are typical of a putative class. It is therefore impossible to determine whether the requirements of class certification can be met. Even assuming that Plaintiff's claims to the contrary are true and a class of plaintiffs does exist, as a discretionary matter a class action should not be maintained. *See, e.g. Baxter Healthcare Corp. v. United States*, 20 CIT 552, 925 F. Supp. 794 (1996). As Plaintiff has been unable to point to any other pending litigation concerning this issue, conflicting decisions are not a concern. There is also no limited fund problem, as the defendant is not a private litigant. In fact, none of the criteria listed in Rule 23(b) have been met. Plaintiff's motion for class certification is therefore denied. *See U.S. Vinadium Corp. v. United States*, 22 CIT 852 (1998) (citing *Baxter*, 925 F. Supp. at 794).

III. Standard of Review

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." USCIT R. 56(c); *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 243 (1986). The movant bears the burden of demonstrating that there is no such issue. *See Precision Specialty Metals, Inc. v. United States*, 25 CIT ___ , 182 F. Supp. 2d 1314, 1318 (2001) (citing *United States v. F.H. Fenderson, Inc.*, 10 CIT 758, 760 (1986)). Here the parties do not dispute any material facts and thus, summary judgment is appropriate. *See Nippon Steel Corp. v. U.S. Int'l Trade Comm'n*, 26 CIT ___ , 239 F. Supp. 2d 1367, 1369 (2002).

Defendant, on the other hand, is entitled to dismissal under USCIT Rule 12(b)(6) where, after accepting Plaintiff's factual allegations made in its complaint and drawing all inferences in favor of Plaintiff, it appears beyond doubt that no set of facts can be proven that would entitle Plaintiff to relief. *See Mitchell Arms, Inc. v. United States*, 7 F.3d 212, 215 (Fed. Cir. 1993); *Constant v. Advanced Micro-Devices, Inc.*, 848 F.2d 1560, 1565 (Fed. Cir. 1988) (citations omitted). In order to determine the sufficiency of a claim, consideration is limited to the facts stated on the face of the complaint, or in-

corporated in the complaint by reference. *Kemet Electronics Corp. v. Barshefsky*, 976 F. Supp. 1012, 1027 (1997) (citations omitted).

IV. Scope of Review

The court recognizes its very limited scope of review in cases implicating United States foreign policy — a matter left to the discretion of the President. *See United States Cane Sugar Refiners' Ass'n v. Block*, 683 F.2d 399, 404 (CCPA 1982) ("[L]et the President's action be authorized, and his action be within the authorizing provisions of the law he cites, and the role of the judiciary is at an end."); *see also American Ass'n of Exporters and Importers v. United States*, 751 F.2d 1239, 1247 (Fed. Cir. 1985) (stating that congressional delegations to the President in the international field are normally given a broad construction) (citing *United States v. George S. Bush & Co.*, 310 U.S. 371, 379–80 (1940); *Block*, 683 F.2d at 399, 404; *Aimcee Wholesale Corp. v. United States*, 468 F.2d 202, 206 (CCPA 1972)). Furthermore, the USTR, a member of the Executive Office of the President, acts at the direction of the President as his negotiating arm in international trade matters. *See* 19 U.S.C. § 2171. Thus, for a court to intervene there must be "a clear misconstruction of the governing statute, a significant procedural violation, or action outside delegated authority." *Maple Leaf Fish Co. v. United States*, 762 F.2d 86, 89 (Fed. Cir. 1985). Furthermore, "the President's findings of fact and the motivations for his action are not subject to review." *Florsheim Shoe Co. v. United States*, 744 F.2d 787, 795 (Fed. Cir. 1984). Mindful of these restraints, the court will consider Plaintiff's claims for relief.

V. Discussion

A. Inclusion on the Retaliatory List

Gilda argues that "section 407 of the Trade and Development Act of 2000 ("TDA") explicitly states that the products on the retaliatory list must be goods of industries that are affected by the European Communities' non-compliance in the beef hormone dispute." Because its products are not affected by the beef exporting industry, Gilda further argues that the inclusion of toasted breads on the retaliatory list was contrary to law. Gilda simply misreads the statute. The TDA modified 19 U.S.C. § 2416 in a number of ways, one of which was to require reciprocal goods on the retaliation list. This statute merely states that the list must *include* reciprocal goods — not that it is limited to reciprocal goods. Specifically, it states

> (F) Requirement to *include* reciprocal goods on retaliation list. The Trade Representative shall *include* on the retaliation list, and on any revised lists, reciprocal goods of the industries affected by the failure of the foreign country or countries to implement the recommendation made pursuant to a dispute settlement proceeding under the World Trade Organization, ex-

> cept in cases where existing retaliation and its corresponding preliminary retaliation list do not already meet this requirement.

19 U.S.C. § 2416(b)(2)(F) (emphasis added). The USTR has included reciprocal goods on the retaliation list, and it is not limited to including solely these products. Therefore, Gilda's claim that its products were unlawfully included on the retaliation list fails.

B. Termination of the Retaliatory List

Plaintiff repeatedly asserts that pursuant to 19 U.S.C. § 2417(c)(1)(B), the retaliation list expired on July 29, 2003. This provision provides for the automatic termination of an action taken under section 301 where no request has been made for the continuation of the action by a representative of the domestic industry who was the intended beneficiary of the action. Specifically, it provides

> (c) Review of necessity.
> (1) If—
>
> > (A) a particular action has been taken under section 301 during any 4-year period, and
> > (B) neither the petitioner nor any representative of the domestic industry which benefits from such action has submitted to the Trade Representative during the last 60 days of such 4-year period a written request for the continuation of such action, such action shall terminate at the close of such 4-year period.

19 U.S.C. § 2417. The Government has produced two such requests from the domestic industry, one from the U.S. Meat Export Federation, received June 2, 2003 and another from the National Cattlemen's Beef Association, received July 21, 2003. *See Deft.'s Resp. in Opp. to Pl.'s Mot. for Writ of Mandamus and Declaratory Relief, Ex.* 2, 4.[5] Even in light of the production of such evidence, Plaintiff asserts that "in reality, there is no domestic industry which has benefitted from the imposition of the 100% duties." *Pl.'s Reply to Deft.'s Resp. in Opp. to Pl.'s Mot. for Writ of Mandamus and Declaratory Relief*, at 3. Based on its unsupported presumption that "these duties have been collected by Customs and deposited into the general treasury" and cursory observation that hormone treated beef from the United States is still barred from entry into the EC, Plaintiff argues that the domestic industry has not benefitted from the USTR's action. Plaintiff therefore seems to suggest that the court

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[5] A third request was submitted by the American Meat Institute, but was received May 29, 2003 – one day before the commencement of the 60-day time window for written continuation requests.

should find that the letters received in support of continuing the retaliatory action do not satisfy the requirements of section 2417. Plaintiff's argument is a *non sequitur*. Nowhere in the statute is there a requirement that importers themselves receive direct payments from collected duties or any other direct benefits in order to qualify as "beneficiaries." Furthermore, the court will not second-guess the USTR's determination of whether the domestic industry respondents are in fact "benefitting" from the retaliation action when the statute merely requires a written request from an industry representative to continue the retaliation. To do so would be to encroach upon the foreign-policy making powers of the executive branch. *See Florsheim*, 744 F.2d at 795.

Plaintiff, in a later brief, argues that while the domestic industry requests "seem to indicate that the USTR did what it was required to do pursuant to section 2417(c)(2)," the list has terminated because the USTR failed to comply with section 2417(c)(3). This latter section directs the USTR to review the effectiveness of the retaliatory action in achieving its objectives as well as the effects of the action on the United States economy. It states that

> (3) If a request is submitted to the Trade Representative under paragraph
> (1)(B) to continue taking a particular action under section 301, the Trade Representative shall conduct a review of—
>
> (A) the effectiveness in achieving the objectives of section 301 of—
>
> (i) such action, and
>
> (ii) other actions that could be taken (including actions against other products or services), and
>
> (B) the effects of such actions on the United States economy, including consumers.

19 U.S.C. § 2417(c)(3). The USTR stated during oral argument that a study is being conducted but that no final result has been reached. *Oral Argument Tr.*, at 45–46. In any event, it does not follow that where the requirements of section 2417(c)(3) are not fulfilled, the retaliation list terminates pursuant to the automatic termination provision of section 2417(c)(1)(B). The statute directs that the section 301 action terminate after a four year period unless it is renewed by a written request from the domestic industry, as discussed above. Where there has been such a request, the action will not terminate and the USTR is directed to conduct an investigation of the effectiveness of the action and the effects of that action on the United States economy. Thus, because the domestic industry requested extension and, notwithstanding the fact that the USTR has yet to hold a hearing on the effect and effectiveness of the measures, the list has not terminated pursuant to section 2417(c).

C. Removal from the Retaliatory List

Gilda also argues that the Trade and Development Act of 2000 amended section 2416(b)(2) in order to require that the USTR periodically revise retaliation lists.[6] The statute, as amended by the TDA, provides

> (B) Revision of retaliation list and action.
> (i) Except as provided in clause (ii), in the event that the United States initiates a retaliation list or takes any other action described in section 301(c)(1)(A) or
> (B) against the goods of a foreign country or countries because of the failure of such country or countries to implement the recommendation made pursuant to a dispute settlement proceeding under the World Trade Organization, the Trade Representative shall periodically revise the list or action to affect other goods of the country or countries that have failed to implement the recommendation.
>
> (ii) Exception.
> The Trade Representative is not required to revise the retaliation list or the action described in clause (i) with respect to a country, if —
> (I) the Trade Representative determines that implementation of a recommendation made pursuant to a dispute settlement proceeding described in clause (i) by the country is imminent; or
> (II) the Trade Representative together with the petitioner involved in the initial investigation under this chapter (or if no petition was filed, the affected United States industry) agree that it is unnecessary to revise the retaliation list.
>
> (C) Schedule for revising list or action. The Trade Representative shall, 120 days after the date the retaliation list or other section 301(a) action is first taken, and every 180 days thereafter, review the list or action taken and revise, in whole or in part, the list or action to affect other goods of the subject country or countries.

19 U.S.C. § 2416. Although over four years have passed since the TDA went into force, the Government has yet to revise the *Hormones* retaliation list. Citing to the *Trade Policy Agenda and 2002 Annual Report of the President of the United States on the Trade Agreements Program*, the Government indicates that it continues to negotiate

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[6] This provision is also referred to as the "Carousel provision" because it encourages products to be rotated on and off of retaliation lists.

with the E.C. in an effort to resolve the beef-hormones dispute. While there is no indication that the domestic beef industry agrees that it is unnecessary to revise the retaliation list,[7] the USTR has invoked subsection (I) of the exception to the requirement that the retaliation list be periodically revised. During oral argument, the Government stated that "[i]n this case because the USTR believes that a solution with the European Communities is imminent it has not implemented the Carousel provision." *Oral Argument Tr.*, at 43. Plaintiff cites to these provisions and seeks a refund of the 100% duties it paid on three separate entries. It is not, however, entitled to such relief under the statute.

Gilda argues that it would have challenged the 100% duties through the public comment proceedings had the USTR published a Federal Register notice every 180 days as required by the statute. Because the USTR failed to do so, Gilda argues, it was impossible to challenge the maintenance of its products on the *Hormones* list. Section 2416(b)(2) does not, however, provide for money damages or refund of duties as a consequence of the USTR's failure to either revise the list according to schedule or invoke one of the exceptions. Furthermore, the statute merely requires the USTR to *revise* the retaliation list *in whole or in part*. When revising, the USTR has complete discretion to retain any of the HTSUS subheadings already on the list. Thus, even if the court were to compel the Government to revise the list, Gilda has no guarantee of relief. At best, Gilda could hope for an opportunity to petition the USTR to remove the HSTUS subheading for toasted breads from the list, but is not entitled to refund of duties already paid. Gilda refutes this notion by citing to *Swisher Int'l Inc. v. United States*, 205 F.3d 1358 (Fed. Cir. 2000). Gilda's reliance on *Swisher*, however, is misplaced because that case dealt with refunds of illegally exacted taxes. In the case at hand, the United States acted in accordance with the law when imposing 100% duties on Gilda's entries. Gilda merely argues that the USTR violated the law by not revising the list every 180 days — an action that would not necessarily have removed toasted breads from the *Hormones* list. Thus, because the court finds that the exception provided for in 19 U.S.C. § 2416(b)(2)(B)(ii)(I) applies, the USTR is not required to publish or revise the *Hormones* list under the current facts. Additionally, because neither money damages nor refunds are available, Gilda's arguments both for removal from the *Hormones* list as well as for a refund of the 100% duties it has paid must fail.

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[7] To the contrary, the National Cattlemen's Beef Association states that "[they] continue to believe that a 'carousel' mechanism of compensation would serve as a better tool" to resolve the hormones dispute. *Deft.'s Resp. in Opp. to Pl.'s Pet. for Writ of Mandamus and Decl. Rel., Ex.* 4.

D. Due Process

Finally, Plaintiff claims that its procedural due process rights under the Fifth Amendment to the Constitution of the United States were violated by the USTR's failure to revise the *Hormones* list under the Carousel provision for over 42 months. As a result of this failure to act, Gilda argues, "[t]he USTR has failed to provide notice and an opportunity to be heard for the Plaintiff's removal of their products from the Beef Hormone Retaliation List . . . ." *Pl.'s Opp. to Deft.'s Mot. to Dismiss*, at 20. Gilda cites to *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985), in support of the notion that the essential requirements of due process are notice and an opportunity to respond, and argues that "under present rule of law, the only way the Plaintiffs can have their products removed from the Beef Hormone Retaliation List is by publication of a Federal Register notice by the USTR every 180 days and the opportunity to submit written comments and/or attend a hearing. . . ." *Pl.'s Opp. to Deft.'s Mot. to Dismiss*, at 20. It is clear, however, that Gilda was afforded early and ample opportunity to challenge, question and comment on the inclusion of the products it imports on the *Hormones* list, and to seek removal of these products from that list. *See Implementation of WTO Recommendations Concerning EC — Measures Concerning Meat and Meat Products (Hormones)*, 64 Fed. Reg. 14,486 (Mar 25, 1999) (requesting comments on composition and implementation of retaliation list and giving notice of public hearing to receive testimony on the preliminary list). Gilda, by its own admission, did not take advantage of these opportunities. *See Pl.'s Opp. to Deft.'s Mot. to Dismiss*, at 15 ("Gilda did not participate in the original comment period when the Beef Hormone Retaliation List was established nor in the comment period for the first Federal Register notice regarding changes to be followed by the 'Carousel provision.'"). Gilda's constitutional due process rights have not, therefore, been violated by the USTR. To the contrary, Gilda was afforded due process prior to any potential deprivation that might have occurred. *See United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 48 (1993) ("[Supreme Court] precedents establish the general rule that individuals must receive notice and an opportunity to be heard *before* the Government deprives them of property." (emphasis added)); *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) ("The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner."). The court also notes that the Supreme Court has held that the agency has discretion in determining when the hearing is to be held, only requiring that it take place prior to the "final order becoming effective." *Opp. Cotton Mills. v. Administrator*, 312 U.S. 126, 152, 153 (1941). In the case at hand, Plaintiff had a full and fair opportunity to be heard on the inclusion of HTSUS subheading 9903.02.35 on the *Hormones* retaliation list. Subsequent to this opportunity, the USTR is not required by the Constitution to

provide additional process. Thus, Plaintiff's claim that it was deprived of its due process rights under the Fifth Amendment must fail.

VI. Conclusion

For the reasons stated above, Plaintiff's motion to supplement its response is granted; its motions for class certification, for writ of mandamus and declaratory relief, to join the United States Trade Representative and Commissioner of Customs and Border Protection as defendants and to amend its amended complaint are denied. Plaintiff is not entitled to summary judgment on its due process claim. Furthermore, Defendant's motions to dismiss both of Plaintiff's complaints (original and amended) for failure to state a claim are granted.

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